

EXHIBIT 1

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF DELAWARE
 3
 4 ATTENTIVE MOBILE, INC.,)
 5 Plaintiff,) C.A. No. 22-1163-CJB
 6 v.)
 7 317 LABS, INC., d/b/a EMOTIVE,)
 8 Defendant.)
 9 -----
 10 ATTENTIVE MOBILE, INC.,)
 11 Plaintiff,) C.A. No. 23-87-CJB
 12 v.)
 13 STODGE INC., d/b/a POSTSCRIPT,)
 14 Defendant.)
 15 BRITISH TELECOMMUNICATIONS PLC)
 and BT AMERICAS, INC.,)
 16 Plaintiffs,) C.A. No. 22-1538-CJB
 v.)
 17 PALO ALTO NETWORKS, INC.,)
 18 Defendant.)
 19
 20 J. Caleb Boggs Courthouse
 21 844 North King Street
 Wilmington, Delaware
 22 Friday, July 14, 2023
 23 9:45 a.m.
 Motions Hearing
 24 BEFORE: THE HONORABLE CHRISTOPHER J. BURKE
 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
 25

1 APPEARANCES CONTINUED:

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 Stodge, Inc.
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 BY: PHILIP A. ROVNER, ESQUIRE
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 -and-
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 PROSKAUER ROSE LLP
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 10 For the Plaintiff
 BT Americas
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 FARNAN, LLP
 BY: BRIAN E. FARNAN, ESQUIRE
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 13 -and-
 14 WEIL GOTSHAL & MANGES
 BY: ANISH DESAI, ESQUIRE
 BY: PRIYATA PATEL, ESQUIRE
 BY: THOMAS YU, ESQUIRE
 15
 16 For the Defendant
 Palo Alto Networks
 17
 18 *** PROCEEDINGS ***
 19
 20 09:38:58 DEPUTY CLERK: All rise.
 21 09:38:58 THE COURT: It looks like our IT staff is still
 22 looking at some computer stuff. Why don't I go ahead and
 23 give you a chance to finish up with that, and just let me
 24 know when we're ready to proceed and we'll go from there.
 25 Okay. I'll take a recess.

1 APPEARANCES:
 2 MORRIS NICHOLS ARSH & TUNNELL LLP
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 In C.A. No. 22-1163-CJB
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 In C.A. No. 23-87-CJB
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 BY: ANDREW BROWN, ESQUIRE
 BY: BINDU PALAPURA, ESQUIRE
 18
 -and-

18 4
 1 09:49:56 DEPUTY CLERK: All rise.
 2 09:53:21 THE COURT: Please be seated. Good morning,
 3 09:53:24 again. Take two.
 4 09:53:27 Good to be with you all today. And I know we
 5 09:53:29 have all of counsel for our parties here and the court
 6 09:53:33 reporter. And we thank our court reporter for all her
 7 09:53:35 service.
 8 09:53:35 And so, why don't we go on the record. And as
 9 09:53:38 we do, why don't I just say a few things for the record.
 10 09:53:42 And the first is that we're here today, as the parties know,
 11 09:53:45 for a 101, Section 101 setting at least, in three cases.
 12 09:53:51 Two of them are related.
 13 09:53:54 The two related cases involve the same
 14 09:53:59 Plaintiff, that's Attentive Mobile Inc. The first of those,
 15 09:54:03 Civil Action Number 22-1163-CJB. The Defendant there is 317
 16 09:54:13 Labs, Inc. doing business as Emotive.
 17 09:54:15 And in Civil Action Number 23-87-CJB, the
 18 09:54:21 Defendant is Stodge, Inc. doing business as Postscript.
 19 09:54:24 And, then, in our last case, that case is *BT*
 20 09:54:30 *Americas Inc. vs. Palo Alto Networks, Inc.* It's Civil Action
 21 09:54:35 Number 22-1538-CJB here in our court.
 22 09:54:40 And we're here today to address motions filed by
 23 09:54:43 the respective Defendants in the respective cases seeking
 24 09:54:47 dismissal of the respective Complaints, Section 101 claims.
 25 09:54:52 Okay. Before we go further, let's have counsel

09:54:55 1 for the parties identify themselves for the record. I think
 09:54:58 2 our Attentive Mobile cases are first. And so, we'll ask
 09:55:04 3 counsel for Plaintiff's side, and particularly start with
 09:55:08 4 Delaware counsel, to identify themselves.

09:55:09 5 MR. FLYNN: Good morning, Your Honor. Michael
 09:55:11 6 Flynn from Morris Nichols on behalf of Attentive Mobile.
 09:55:13 7 With me today is Jonathan Weinberg, Ryan Schmid and Britton
 09:55:17 8 Davis from King & Spalding.

09:55:18 9 Mr. Weinberg will be arguing today for
 09:55:21 10 Attentive. And in the gallery is Troy Lieberman from
 09:55:23 11 Attentive Mobile.

09:55:24 12 THE COURT: Okay. Thank you. Welcome to you
 09:55:26 13 all.

09:55:26 14 Let's have Defendants' counsel in both of the
 09:55:30 15 cases identify themselves. And, again, we'll start first
 09:55:35 16 with Delaware counsel.

09:55:37 17 MR. BROWN: Good morning, Your Honor. Andy
 09:55:38 18 Brown from Potter Anderson on behalf of Defendant,
 09:55:41 19 Postscript. With me today are my colleagues, Bindu
 09:55:45 20 Palapura, also from Potter, gene Novikov from Morrison
 09:55:50 21 Foerster, and Vanessa Katz from Postscript.

09:55:52 22 THE COURT: And who will be arguing?

09:55:54 23 MR. BROWN: Mr. Novikov will be arguing.

09:55:57 24 THE COURT: Thank you. We'll do the same for
 09:56:00 25 Emotive's counsel, and we'll start with Delaware counsel.

09:57:02 1 THE COURT: Okay. Thank you, counsel. Good
 09:57:04 2 morning again to all.
 09:57:06 3 All right. Counsel, so just by way of ground
 09:57:09 4 rules, I think we worked this all out ahead of time. So, we
 09:57:12 5 said the Attentive Mobile cases are going to go first. I
 09:57:16 6 allocated 30 minutes per side for arguments. We've got two
 09:57:20 7 different Defendants, although, obviously, the issues are
 09:57:23 8 related. So, we'll keep track of time up here, and I'll let
 09:57:27 9 you know when you've got about five minutes left in your
 09:57:30 10 time.

09:57:30 11 And then after we hear arguments in that case,
 09:57:34 12 we'll hear arguments in the BT case. Maybe we'll take like
 09:57:40 13 a short break just to let counsel get things switched out at
 09:57:43 14 counsel table, hear arguments in the BT case. And then
 09:57:47 15 before we adjourn then for lunch, I always like to try to
 09:57:53 16 take advantage of the fact that we've got a lot of folks
 09:57:56 17 here who are thoughtful about the Section 101 issues which,
 09:57:59 18 as you all know, our court deals with to a great degree.
 09:58:03 19 And I appreciate the parties' letters. And in
 09:58:07 20 the letters, I sometimes ask the parties, Hey, you're not
 09:58:11 21 only here to address kind of the key cases that are most
 09:58:14 22 significant to their own motion, but also just some general
 09:58:17 23 concepts of Section 101 law that can be challenging. They
 09:58:20 24 did that in those letters. It was really helpful. And they
 09:58:23 25 pointed me to some case law that I either hadn't read or if

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09:56:01 1 MR. DAY: Good morning, Your Honor. John Day
 09:56:02 2 from Ashby & Geddes for Emotive. With me, Richard
 09:56:07 3 Martinelli from Orrick. And Mr. Martinelli will be
 09:56:09 4 presenting on behalf of Emotive.

09:56:11 5 THE COURT: All right. Thank you.

09:56:13 6 And going in the back of the courtroom, let's
 09:56:16 7 have introductions for our last case, which is the BT
 09:56:21 8 Americas case. And we'll begin with Delaware counsel. You
 09:56:24 9 can stay back there. You don't have to come all the way up
 09:56:26 10 to the podium.

09:56:27 11 Mr. Rovner.

09:56:27 12 MR. ROVNER: Good morning, Your Honor. Phil
 09:56:29 13 Rovner from Potter Anderson for the BT Plaintiffs. And with
 09:56:31 14 me, my co-counsel from the Proskauer firm in New York, Nolan
 09:56:37 15 Goldberg and Balda Vinti. Also, Edward Wang from Proskauer
 09:56:41 16 as well.

09:56:43 17 As we said in our email to the Court that
 09:56:45 18 Mr. Goldberg will be arguing on behalf of BT.

09:56:47 19 THE COURT: Okay. Thank you and welcome.
 09:56:52 20 We'll do the same for counsel on Defendant's
 09:56:53 21 side, starting with Delaware counsel.

09:56:54 22 Mr. Farnan.

09:56:54 23 MR. FARNAN: Good morning, Your Honor. Brian
 09:56:54 24 Farnan on behalf of Defendant. With me is Anish Desai,
 09:56:58 25 Priyata Patel, and Tom Yu. And Mr. Desai will be arguing.

09:58:27 1 I had read it, I had forgotten. So, I thank them.

09:58:30 2 And so, I did want to ask you a couple of
 09:58:33 3 questions, just generally about the law, after we finish our
 09:58:36 4 arguments specifically in these cases. And one question
 09:58:39 5 that I'd like to get, if you have any thoughts, the benefit
 09:58:43 6 of your thoughts about is just kind of a general one. I
 09:58:46 7 wanted to mention it now, just so you can think about it
 09:58:49 8 while you have a break in the proceedings this morning.

09:58:51 9 And that is, you know, is there any concept with
 09:58:56 10 regard to Section 101 jurisprudence and particularly how
 09:59:01 11 that jurisprudence is supposed to work at the Rule 12 stage,
 09:59:04 12 that you think that courts or litigants are generally
 09:59:10 13 getting wrong? Or do you think that the law is really
 09:59:13 14 telling us we should be thinking about it in a certain way
 09:59:17 15 or looking at it in a certain way, but you think that maybe
 09:59:23 16 courts generally or litigants generally really aren't quite
 09:59:27 17 looking at it in the right way, the way that the Federal
 09:59:30 18 Circuit really is telling us to do it, and the Supreme Court
 09:59:32 19 is telling us to do it.

09:59:33 20 I guess another way of phrasing this is: What
 09:59:35 21 do you think is kind of the most misunderstood key principle
 09:59:38 22 about Section 101 law that you wish courts would get right?
 09:59:42 23 And I say that because I want to try to make sure I'm always
 09:59:45 24 thinking about these things in the right way and trying to
 09:59:47 25 get the issues right. And they are challenging issues, as

09:59:49 1 we will see today with our motions.

09:59:51 2 All right. So, not that you have to have any
09:59:54 3 thoughts on that. But if you do, that's a question I think
09:59:57 4 I would like the answer to.

09:59:58 5 So, let's begin with our Attentive Mobile
10:00:01 6 motions, and I'll turn to Defendant's counsel, as it's their
10:00:05 7 motions, and that's how it was worked out who was going to
10:00:08 8 go first.

10:00:11 9 MR. NOVIKOV: Good morning, Your Honor. Gene
10:00:14 10 Novikov of Morrison Foerster for Postscript. I'm going to
10:00:17 11 take the lead. I'm going to try to save seven minutes or so
10:00:21 12 for my colleague, Mr. Martinelli, and then five minutes for
10:00:25 13 myself to come back and say more things after Mr. Weinberg
10:00:30 14 is done. So, I'm going to try to do 18 here and see how I
10:00:34 15 do.

10:00:34 16 THE COURT: Okay. That's impressive.

10:00:36 17 All right. Why don't we begin, and I'll stop
10:00:39 18 you with any questions.

10:00:40 19 MR. NOVIKOV: Okay. I think the right place to
10:00:42 20 start in evaluating questions of eligibility for these sorts
10:00:47 21 of software patents is looking at the specification to
10:00:51 22 figure out what problem in the prior art the inventors were
10:00:55 23 trying to solve and what improvement their patent was
10:00:59 24 offering.

10:00:59 25 So, this is the problem statement from the

10:02:27 1 isn't optimal. And so, we are going to make the computers
10:02:31 2 work in a different way to function in a different way.
10:02:34 3 Couldn't it be said that that's what's also
10:02:37 4 being conveyed?
10:02:38 5 MR. NOVIKOV: I appreciate that distinction, and
10:02:40 6 I agree with the Court that the advance that's being
10:02:44 7 proffered here isn't limited to just making things go faster
10:02:48 8 or moving more efficiently. But the thing that I do want to
10:02:53 9 point out is that the improvement that's being offered here
10:02:56 10 isn't to a particular server, or a particular network or
10:03:01 11 even a particular piece of software. It is saying the way
10:03:06 12 that we are executing this notion of enrolling in an online
10:03:12 13 promotion using computers isn't very good, and we're going
10:03:16 14 to do it differently.

10:03:18 15 And so, it is not, I don't think, an improvement
10:03:21 16 to any particular computer functionality. It is saying,
10:03:27 17 We've got this thing that's going on in the Internet, and
10:03:30 18 we're going to try to figure out a way to do that better.
10:03:33 19 And I think that that's different from an improvement to
10:03:38 20 computer functionality in the way that the Federal Circuit
10:03:41 21 has noted it.

10:03:42 22 So, this might be a good place to address the
10:03:44 23 *DDR Holdings* analogy that came up in the letter briefing.
10:03:49 24 Right. So, in *DDR Holdings*, the invention was an
10:03:51 25 improvement to the routine conventional function of an

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10:01:02 1 specification. It says, The problem that the inventors were
10:01:06 2 trying to solve was that the process for users to respond to
10:01:11 3 online offers and promotions was too long, and people would
10:01:16 4 lose interest, and the vendor or the online vendor would
10:01:19 5 lose their business.

10:01:20 6 And --

10:01:21 7 THE COURT: And if you could go back, because I
10:01:23 8 think, you know, this portion of the spec is going to be key
10:01:26 9 in Column 1. I wonder, though, whether, and I guess the
10:01:32 10 question is whether you're short selling all that is being
10:01:36 11 said here.

10:01:36 12 So, certainly, I think, as you've noted in the
10:01:39 13 briefing, there is a focus here on kind of the
10:01:47 14 time-consuming nature of the prior art process. You know,
10:01:52 15 and let's try to save time. Let's try to make this go
10:01:56 16 quicker.

10:01:57 17 And like for a Defendant in a Section 101 case,
10:01:59 18 it makes sense that you would be focusing on that. I'll let
10:02:01 19 you go on to that.

10:02:03 20 Doing something quicker on a computer is not
10:02:06 21 necessarily the kind of thing that might save the Plaintiff
10:02:09 22 on eligibility issues. But isn't there also the component
10:02:12 23 in here where the patent is essentially saying, Look, the
10:02:16 24 way that computers worked with regard to this sign-up
10:02:23 25 process was that they worked in a certain way, and that way

10:03:55 1 Internet hyperlink protocol. And the invention was an
10:03:59 2 improvement to the way that hyperlinks worked. Right.
10:04:02 3 Ordinarily, you click on a hyperlink, and it
10:04:05 4 would go from one page to another page perhaps on a
10:04:08 5 different server. And they had invented a new type of link,
10:04:12 6 right. And it would work differently. Rather than
10:04:14 7 transporting the user to a different website on a different
10:04:17 8 server, it would automatically generate a brand new hyper
10:04:22 9 website, a new type of link analogous to the new database
10:04:25 10 that the Federal Circuit found embodied in the *Enfish*
10:04:29 11 claims.

10:04:29 12 Now, in the supplemental letter brief that was
10:04:32 13 filed at Docket 43, the analogy that they draw to the *DDR*
10:04:37 14 *Holdings* goes as follows. They say, In *DDR Holdings*, you
10:04:40 15 have a new type of hyperlink that overwrote the conventional
10:04:44 16 sequence of events. Their invention overrides the
10:04:46 17 conventional sequence of events "ordinarily triggered by the
10:04:51 18 click of an advertisement in the prior art mobile sign-up
10:04:54 19 systems."

10:04:55 20 And I think that's pretty telling because it
10:04:58 21 seems to me to be an admission that they aren't improving
10:05:01 22 the way that a computer works or a particular computer
10:05:03 23 technology. They're improving the abstract idea of signing
10:05:08 24 up for promotional offers on the Internet, right. And the
10:05:12 25 way that they're doing it is by deploying this deeplinking

10:05:16 1 technology that they admit in their patents and in their
 10:05:18 2 briefs is conventional, known and standardized.
 10:05:22 3 THE COURT: And I think maybe what you're saying
 10:05:23 4 is, you know, there could be different ways in which one
 10:05:28 5 attempts to utilize computers and computer software in an
 10:05:32 6 unconventional way. One way to do it is to literally create
 10:05:37 7 or talk about creating because sometimes in these patents,
 10:05:40 8 although they say, We're doing or creating something
 10:05:42 9 specific, they may not always explain exactly how, but it's
 10:05:46 10 to create a new type of functionality. A new type of -- you
 10:05:53 11 know, a particular way that software works that maybe has
 10:05:58 12 not been created before.

10:06:01 13 But we know, you know, and this may be more of a
 10:06:06 14 step two thing, but we know that another way in which you
 10:06:08 15 can utilize computer technology, including software
 10:06:13 16 unconventionally for purposes of 101 law, is by utilizing
 10:06:17 17 otherwise known elements in an unconventional combination.

10:06:20 18 And like I think when you're analogizing this to
 10:06:23 19 *DDR*, you're talking about the first thing, not a new way to
 10:06:26 20 use computers or software. But the other side may be
 10:06:29 21 focusing on the second thing, which it is a combination of
 10:06:34 22 both ways. Isn't that a different way to do it?

10:06:38 23 MR. NOVIKOV: Absolutely. So, I think one thing
 10:06:41 24 that Federal Circuit law that has been clear about is you
 10:06:45 25 have a problem, at least to start with, when you're

10:08:04 1 transferring data utilized or, you know, customized text
 10:08:09 2 messages, was that all known? Yes.
 10:08:11 3 I don't think they're even contesting that, and
 10:08:15 4 they're saying, Yeah, but the way we're putting it all
 10:08:17 5 together here, that was new.
 10:08:18 6 MR. NOVIKOV: That's right. And I think we are
 10:08:21 7 asking the Court to look beyond the terms that they're using
 10:08:27 8 and putting up on the screen in this diagram here and to
 10:08:33 9 consider what this actually all amounts to.
 10:08:36 10 So, I'm going to skip past this because I think
 10:08:39 11 we are sort of on the same page that, you know, the
 10:08:42 12 click-to-text server is just a server. The client server,
 10:08:45 13 we don't really know what it is at all. We just kind of
 10:08:47 14 infer that it serves web pages. The browser is a browser in
 10:08:50 15 the diagram. It's actually in the patent. Any sort of
 10:08:53 16 interface that a user has on a computer. And then the
 10:08:58 17 notion of an integration tag is completely abstract.
 10:09:03 18 I would love to hear today if there's going to
 10:09:06 19 be something that they're going to ask for in claim
 10:09:08 20 construction that's going to make it anything other than
 10:09:10 21 just code on a web page. But I think if you look at this,
 10:09:13 22 all of that in mind, all you have here in -- it's the part
 10:09:18 23 that I've circled in red -- is you're serving a web page
 10:09:22 24 that collects some user data, right. And all you have in
 10:09:26 25 this second piece, which is really the solution that they're

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10:06:48 1 deploying computer technology that you admit, at least in
 10:06:52 2 pieces, in components, is known conventional to solve -- to
 10:06:56 3 kind of improve a business process like this. And so, the
 10:06:59 4 move that people make, exactly as you say, is, Well, we may
 10:07:03 5 be deploying conventional computer components to solve a
 10:07:08 6 business process, but we are arranging those components in a
 10:07:12 7 way that's new and in a way that hasn't been done before,
 10:07:15 8 right.

10:07:15 9 And that's the *Finjan* case, the *BASCOM* case, and
 10:07:20 10 those are cases that say you've got some assertedly new
 10:07:21 11 configuration of elements or some change to the way that the
 10:07:27 12 components interact with each other that takes it out of the
 10:07:30 13 realm of abstract idea.

10:07:31 14 And, of course, that's how the Court thought
 10:07:33 15 about the question in the *Nelsen* case that Your Honor
 10:07:36 16 highlighted for us in the Order preceding this hearing, like
 10:07:39 17 is there an arrangement that's sufficiently specific and
 10:07:43 18 particularized to give the Court assurance that what's being
 10:07:45 19 patented is new? And that's what they're trying to do here.

10:07:48 20 THE COURT: And to make it more specific in
 10:07:50 21 terms of the graphic you have up on Slide 6, which I think
 10:07:53 22 comes from the other side's brief is, like, no question,
 10:07:58 23 were integration tags known? They were. Were websites
 10:07:59 24 known? They were. Was the concept of using URI with a
 10:08:02 25 deeplink known? Yes, no question. Was the concept of

10:09:30 1 claiming they developed to their problem, is this known
 10:09:34 2 conventional, indeed, standardized way of switching between
 10:09:38 3 one application to another using a deeplink, right.
 10:09:43 4 There are -- there's a listing in the '074
 10:09:46 5 patent, not just of the protocol, but of press coverage of
 10:09:50 6 the way that you would do this in the Android system and the
 10:09:55 7 MAC IOS system. And then all you have in part three is
 10:09:57 8 receiving a text.

10:09:59 9 THE COURT: Can you just go back to the excerpt,
 10:10:01 10 though? Is it just the use of the URI with the deeplink? I
 10:10:04 11 mean, the patent talks about custom-generated deeplinks, and
 10:10:08 12 my sense is that the custom-generated part of what this
 10:10:12 13 patent says it's about is a nod towards, yeah, we're using,
 10:10:18 14 you know, deeplink technology via URIs.

10:10:21 15 MR. NOVIKOV: So --
 10:10:21 16 THE COURT: But we're doing it in a way that
 10:10:23 17 customizes the resulting message. What do we mean by that?
 10:10:29 18 Well, we're going to be utilizing some data that is
 10:10:31 19 particular to the user or the public website at issue.
 10:10:33 20 Isn't it fair that it's more than just URIs and
 10:10:36 21 deeplinks?
 10:10:37 22 MR. NOVIKOV: So, a deeplink is, to some degree,
 10:10:43 23 customized by its nature because it's going to point
 10:10:45 24 somewhere in particular.
 10:10:46 25 THE COURT: From one app to another you're

10:10:49 1 saying?
 10:10:50 2 MR. NOVIKOV: That's right. I take the one app
 10:10:52 3 to a specified place in the second app. I take Your Honor's
 10:10:54 4 point that the notion here is that it is going to customize
 10:10:58 5 based on some data that is received from the user.

10:11:03 6 Note that it's not actually a requirement of all
 10:11:05 7 of the claims they're asserting. So, query how integral a
 10:11:09 8 part of their invention it really is.

10:11:11 9 THE COURT: And on that, let me stop you there,
 10:11:12 10 because I think I saw on your slides, I may be conflating
 10:11:16 11 the cases, but am I right that some of your slides, maybe
 10:11:19 12 near the end, talk about how, well, you know, Look, the '887
 10:11:24 13 patent, Claim 1 says this, but not necessarily these other
 10:11:27 14 independent claims?

10:11:28 15 MR. NOVIKOV: That's right.

10:11:29 16 THE COURT: I guess my question is: In your
 10:11:30 17 briefing, did you ever say, Wait a second, it's not okay to
 10:11:33 18 just use any one of these independent claims referenced in
 10:11:36 19 the Complaint because, Look, this independent claim doesn't
 10:11:39 20 have this component, which the Plaintiff is now relying on.

10:11:42 21 I don't think you did that.

10:11:43 22 MR. NOVIKOV: That's fair, Your Honor. I mean,
 10:11:45 23 we did make a point that this was not an accurate
 10:11:51 24 representation of all of the claims. And I think there is
 10:11:54 25 one or two examples in both Defendants' briefs that say that

10:13:35 1 anything about the user at all. Other information
 10:13:38 2 identifying the user or user mobile device, the user viewing
 10:13:44 3 history, click history, user status, cookies.
 10:13:46 4 I mean, it doesn't, again, feel to me like the
 10:13:50 5 notion that you have put some code in a web page that it's
 10:13:53 6 going to send the user data back is something that they can
 10:13:59 7 credibly say wasn't a known thing.

10:14:00 8 THE COURT: And maybe this gets to an issue, a
 10:14:01 9 step two issue I wanted to ask you about, which is, again,
 10:14:04 10 we talked about the difference between establishing that
 10:14:06 11 each individual piece of software or hardware that's
 10:14:10 12 referenced in the claim is known versus the difference
 10:14:12 13 between demonstrating or having the record demonstrate that
 10:14:16 14 the ordinary combination of those steps, the software or
 10:14:18 15 hardware, related steps are known.

10:14:21 16 You cite ZZ/a bunch in your briefs, I think,
 10:14:25 17 for the idea that, you know, the way -- the ordinary use of
 10:14:29 18 the technology itself can't be -- can't help with regard in
 10:14:33 19 eligibility. But I think there what I'm looking for in the
 10:14:36 20 record is, Show me something in the record that says, Yeah,
 10:14:39 21 yeah, see, people were using integration tags embedded in
 10:14:45 22 websites that when accessed generated URIs with deeplinks
 10:14:51 23 that created custom text messages with user data and website
 10:14:55 24 data that related to some of the users. Show me that that
 10:14:58 25 was ordinary, not just the individual components, but show

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10:12:00 1 specific things are not found in the claims. I concede that
 10:12:05 2 the particular granular comparison that's in the slides is
 10:12:08 3 not in the briefs.

10:12:09 4 THE COURT: Let me let you continue.

10:12:10 5 MR. NOVIKOV: The only point I was going to make
 10:12:12 6 is -- additional point is if we had claimed advances, Well,
 10:12:18 7 we're going to provide a personalized link, there is Federal
 10:12:23 8 Circuit case law, I think it is ZZ, but I'm going to
 10:12:27 9 double-check that and maybe get up and just say the name of
 10:12:30 10 the case after everybody is done, that a personalized URL is
 10:12:34 11 not sufficient.

10:12:36 12 And that makes sense. Like the notion that
 10:12:39 13 you're going to point somebody to a place on the Internet
 10:12:42 14 based on something that they tell you doesn't feel to me
 10:12:45 15 like something that ought to get across the threshold.

10:12:49 16 THE COURT: Is it clear, Mr. Novikov, that as to
 10:12:52 17 the first couple steps of your -- that the embedding of
 10:12:58 18 integration tags in web pages such that when those web pages
 10:13:03 19 are accessed, the tag sends data back to a server, was that
 10:13:07 20 known?

10:13:08 21 MR. NOVIKOV: I mean, I think the notion of
 10:13:16 22 embedding some code in a web page that causes some user data
 10:13:20 23 to be sent back, I think it has to be true that that was
 10:13:26 24 known. Especially whereas here, the types of user data that
 10:13:31 25 are identified as being transmitted back is basically

10:15:01 1 me that utilization of technology was ordinary.

10:15:04 2 In your briefing when you're getting to that,
 10:15:07 3 that ordered combination argument you also make in step two,
 10:15:10 4 I don't see you citing anything for that. I mean, was it
 10:15:13 5 ordinary to use all these things in a computer software
 10:15:17 6 based way at the time?

10:15:18 7 MR. NOVIKOV: I think -- well, so the place
 10:15:24 8 where I would go for this is the idea which was, obviously,
 10:15:34 9 that piece at least, which is the core of the solution that
 10:15:37 10 was admitted to be known.

10:15:40 11 How does the deeplink work? Well, the deeplink
 10:15:43 12 is a link in an app or on a web page that is placed there,
 10:15:48 13 is served to the mobile device by a server, and it sends you
 10:15:52 14 somewhere else.

10:15:53 15 I agree with the Court that there isn't
 10:15:56 16 something in the specification that you could point to and
 10:15:59 17 have a cite to that says, Well, all of this was known. I
 10:16:03 18 think if that had been in the specification, you wouldn't
 10:16:06 19 have -- this wouldn't have gotten past the Patent Office to
 10:16:11 20 begin with.

10:16:11 21 THE COURT: We might not be here; right? We
 10:16:13 22 might not be here today; right?

10:16:15 23 MR. NOVIKOV: Right. But I think what -- I
 10:16:19 24 think it is pretty easy to recognize, given how generic the
 10:16:24 25 descriptions of all of these elements are, that all that has

10:16:28 1 happened here is they have taken deeplinking technology, and
 10:16:31 2 they have put it in the middle of, on one hand, serving a
 10:16:36 3 web page that has some code on it that causes some user data
 10:16:43 4 to be sent back. And, on the other hand, receiving a text
 10:16:45 5 and responding to the text by enrolling a user in a
 10:16:49 6 promotion.

10:16:49 7 I really genuinely, in my heart, do not think
 10:16:53 8 that it is oversimplifying the claims to say that they are
 10:16:58 9 directed to causing a mobile device to send user data to a
 10:17:03 10 server with any sort of generic code on it. Use this
 10:17:06 11 standard deeplinking protocol to pre-fill a text message and
 10:17:11 12 receive a pre-filled text message and enroll the user in a
 10:17:15 13 promotion.

10:17:16 14 Before the buzzer goes off for me, I appreciate
 10:17:20 15 the concern that the granular comparison between the claims
 10:17:23 16 and the description wasn't in the link. I do want to
 10:17:26 17 make -- I do want to linger for just a second, if the Court
 10:17:29 18 will allow me, on the notion that if what is supposed to
 10:17:35 19 provide sort of the how here and differentiate the claims
 10:17:39 20 from an abstract idea, the claims of two of the three
 10:17:42 21 patents don't say anything about multiple servers that could
 10:17:46 22 affect server or client server.

10:17:49 23 And one of them doesn't say anything about an
 10:17:51 24 integration tag at all. And, in fact, says that the means
 10:17:55 25 for displaying the promotion can go straight to the mobile

10:19:00 1 MR. MARTINELLI: So, I want to go back to where
 10:19:02 2 you started with the background of the patent and really
 10:19:06 3 grappling with: How do you distinguish between, I think,
 10:19:09 4 using a computer as a tool, so using known processes in a
 10:19:13 5 computer to just implement an abstract idea, or a business
 10:19:18 6 plan or something that humans would normally do from
 10:19:21 7 something that's inventive and actually like integrates new
 10:19:24 8 technology?

10:19:24 9 And I think in this case, it's pretty easy
 10:19:27 10 because you can analogize things to real-world situations.
 10:19:31 11 So, this is a way to get people to be engaged with
 10:19:35 12 promotions and to respond more efficiently, and more fluidly
 10:19:41 13 and with less friction.

10:19:43 14 That's a business problem. That's a human
 10:19:45 15 problem. That existed before the Internet.
 10:19:48 16 And we talk about in our briefs the fact that
 10:19:50 17 there were things like postage-paid cards. So, let's think
 10:19:56 18 about that scenario and how it compares to what we're
 10:20:00 19 talking about here with the same problem on the Internet.
 10:20:04 20 Now, if you recognized, well, you know, it's
 10:20:07 21 kind of a hassle for somebody to go and realize, I want to
 10:20:11 22 get a subscription to Time, and fill out my address on the
 10:20:15 23 subscription to Time or to renew my subscription to Time and
 10:20:20 24 go out and get a stamp and do all of those things.
 10:20:22 25 You say, Hey, postage-paid cards exist.

10:17:59 1 device from the only server in the claim.

10:18:02 2 And so, if that's what's supposed to make the
 10:18:04 3 claims not abstract, then at least the '897 and the '074
 10:18:09 4 patent don't.
 10:18:10 5 THE COURT: And there that's a question of
 10:18:11 6 waiver, though. And you can, you know, when you get up for
 10:18:13 7 rebuttal, if you can point me to somewhere in your briefing,
 10:18:17 8 including in the reply brief, where you made that case. No,
 10:18:22 9 it's not enough to just treat these three independent claims
 10:18:24 10 the same for purposes of 101. You actually have to look at
 10:18:28 11 them individually, because even if they're right about that
 10:18:30 12 the one claim or one patent is directed to "X," Look, it
 10:18:33 13 doesn't have "Y."

10:18:35 14 I'm not sure you did make that case, but if you
 10:18:38 15 didn't, it would be waived. If you did, though, I want to
 10:18:41 16 know. So, feel free to let me know when you get up for
 10:18:43 17 rebuttal.

10:18:43 18 We'll stop you there. I have some questions,
 10:18:45 19 but maybe I can ask them to Mr. Martinelli and give you a
 10:18:48 20 chance in rebuttal to add to them as well.

10:18:50 21 Okay?

10:18:51 22 MR. NOVIKOV: Thank you, Your Honor.

10:18:52 23 MR. MARTINELLI: Good morning, Your Honor.

10:18:57 24 Richard Martinelli for Emotive.

10:19:00 25 THE COURT: Good morning.

10:20:28 1 Printing technology exists. Printed technology exists where
 10:20:32 2 you can customize that printing so it says, you know, Judge
 10:20:37 3 Burke, we've got an offer for you. That's things that have
 10:20:39 4 happened for a while.
 10:20:40 5 If you said, Oh, well, nobody's ever sent, you
 10:20:44 6 know, a customized message to Judge Burke with a postage
 10:20:48 7 stamp on it using all this existing printing technology,
 10:20:53 8 that's still just an abstract idea. That's still just a
 10:20:55 9 business method. That's something that isn't creating new
 10:20:59 10 technology.

10:21:00 11 That's what we have here, right, the ability to
 10:21:05 12 have an integration tag which is, just as counsel said, some
 10:21:09 13 code that sends information back. The patent talks about
 10:21:12 14 cookies. Cookies are old. Cookies get information about a
 10:21:15 15 user and send it back to a server so that the server knows
 10:21:18 16 about the user.

10:21:19 17 THE COURT: Was it known to utilize integration
 10:21:22 18 tags or their equivalent embedded in web pages such that
 10:21:26 19 when one accesses the page, it would automatically send that
 10:21:29 20 data back to a server?

10:21:30 21 MR. MARTINELLI: That's what a cookie does. So,
 10:21:32 22 the cookies are ways to embed information about a user in
 10:21:34 23 their browser. And so, when you go to a new web page, the
 10:21:39 24 page can say, Let me look at this user's cookies and send
 10:21:42 25 that information back so, oh, I know, because Judge Burke

10:21:46 1 went to Amazon, and Amazon put a cookie, I can read Amazon's
 10:21:52 2 cookie and see that, you know, he likes -- I don't know. I
 10:21:54 3 don't want to guess what you like -- fishing. So, that was
 10:21:58 4 known.

10:21:58 5 Then, the other part that's known is the
 10:22:00 6 customization of the deeplink, right. So, deeplinks were
 10:22:05 7 customizable. They didn't invent a way to put specific text
 10:22:09 8 into the message that's created on the SMS. That was part
 10:22:13 9 of the standard. They don't purport to invent advantages or
 10:22:17 10 new forms of deeplinks. They take existing deeplinks.

10:22:20 11 So, what you have is just like my real-world
 10:22:23 12 analogy where you say, Okay, well, we can print things that
 10:22:25 13 are individualized and postage stamps exist. Let's just
 10:22:29 14 send somebody a printed postcard with their information on
 10:22:32 15 it.

10:22:33 16 So, I think when you look at it that way and you
 10:22:35 17 compare those two situations, you can see there's no
 10:22:39 18 technological innovation that's happening. You're using
 10:22:43 19 existing tools to do a business process.

10:22:45 20 THE COURT: And let me just stop you there. I
 10:22:47 21 think what you said so far is, Look, is the concept of
 10:22:49 22 embedding an integration tag on a website such as that when
 10:22:53 23 one accesses it, user-related data is sent back to a server,
 10:22:57 24 was that known and used and done at the time? Yes, it's the
 10:23:00 25 concept essentially of using cookies on a web. On a web,

10:24:13 1 that.
 10:24:13 2 When you go to say, Okay, where's the beef?
 10:24:15 3 Where's the technology? What did they invent? You go back
 10:24:18 4 to the specification. And when they say, Oh, did you invent
 10:24:21 5 a way to send information back to a user or from a user?
 10:24:27 6 They say, No, we just used cookies.
 10:24:28 7 Did you invent a way to create a customized
 10:24:31 8 link? No, just used existing deeplinks.
 10:24:33 9 So, that's where the: Is there something more
 10:24:35 10 and really focus on what technology was invented that comes
 10:24:39 11 in and really emphasizes the fact that there is no
 10:24:44 12 technological solution.

10:24:46 13 It's also the thing that addresses *DDR*, where in
 10:24:48 14 *DDR* at least, there was the new form of web page that merges
 10:24:53 15 two different web pages together. That's a new form of web
 10:24:57 16 page technology.

10:24:59 17 Here, there's no allegation that there's any new
 10:25:03 18 technology. It's just using these tools that exist in a way
 10:25:08 19 that accomplishes this abstract business core.

10:25:11 20 THE COURT: You say that there's no allegation,
 10:25:13 21 but, again, this may depend on whose burden is it, and why.
 10:25:18 22 But you know, if I'm unclear, if I'm unsure, if the record
 10:25:25 23 doesn't clearly say "X," you know, do I hold that against
 10:25:27 24 the patentee?

10:25:28 25 MR. MARTINELLI: Yeah. And when I say

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10:23:03 1 that was well known.
 10:23:04 2 Is the concept of not only just utilizing a URI
 10:23:07 3 with a deeplink where you go from one app to another, but
 10:23:09 4 having that to create a custom text message, was that known?
 10:23:12 5 Sure it was.

10:23:13 6 Hearing you say that, you know, Mr. Martinelli,
 10:23:17 7 he sounds very thoughtful. I wouldn't be and couldn't be
 10:23:20 8 citing to Mr. Martinelli's argument, right. I would need to
 10:23:24 9 make sure I have in the record is clear enough.

10:23:26 10 I mean, essentially what's happening at this
 10:23:28 11 stage is you are relying on the clear kind of, you know,
 10:23:33 12 no-doubt-about-it presence of an affirmative defense that
 10:23:35 13 wipes out, you know, the patent affirmative defense. The
 10:23:40 14 patent never even really needed to talk about the Complaint.
 10:23:42 15 So, it's like I need the record to show me.

10:23:44 16 Is there record evidence that each of those two
 10:23:46 17 separate pieces we just talked about were well known in that
 10:23:49 18 way?

10:23:49 19 MR. MARTINELLI: Yeah, and I think counsel cited
 10:23:51 20 it in his slides. It's just citing to the patent where, you
 10:23:55 21 know, it -- when you asked the question about what's the
 10:23:59 22 part that people get wrong in doing 101 analysis? I think
 10:24:03 23 it's often like rigidly tying to the, I must only look at
 10:24:07 24 step one during step one. And I must only look at step two
 10:24:10 25 during step two, because I think it's more complex than

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10:25:29 1 "allegation," I mean reading the words of the patent. When
 10:25:32 2 you look in the patent, the patent doesn't even purport to
 10:25:35 3 say that they're inventing new technology in these places.
 10:25:38 4 That's what we cited to, and we presented that
 10:25:42 5 case. They didn't respond with any evidence to contradict
 10:25:46 6 it and say, Oh, no. In fact, here's the place where we
 10:25:49 7 invent new technology.

10:25:50 8 And I think there's a little bit of an issue of
 10:25:53 9 proving a negative, right. We read the patent. The patent
 10:25:57 10 says all of this is conventional. We put it in our briefs
 10:25:59 11 that all of this is conventional. And what more can we do?
 10:26:05 12 They didn't point to anything and say, No, this is the heart
 10:26:07 13 of it.

10:26:07 14 And I do want to get to one additional issue
 10:26:10 15 that's unique to my motion and my effort to rely on *Bot M8*
 10:26:16 16 to show that there's a fundamental inconsistency in the way
 10:26:20 17 that they're pleading the case against Emotive. And what
 10:26:24 18 they say their patents actually taught in the claims. And
 10:26:28 19 that gets right to the heart of what I've highlighted here.

10:26:31 20 We didn't have the benefit of this
 10:26:33 21 lawyer-created formulation of what the patent is about when
 10:26:37 22 we did our brief. This came in in response to Postscript's
 10:26:42 23 brief.

10:26:42 24 And here, and also in Attentive's briefing at
 10:26:47 25 Page 3, they basically say, What we have is a system where

10:26:52 1 the integration tag goes on to a web page. The web page
 10:26:56 2 goes on to a browser to a specific user. That user data
 10:27:00 3 comes back to the click-to-text server. And then that user
 10:27:04 4 data and that information that comes back is used to
 10:27:07 5 generate a custom deeplink.

10:27:09 6 Now, there's no dispute about how Emotive's
 10:27:13 7 service operates. We don't create a deeplink in this
 10:27:17 8 dynamic fashion. Our customers create a deeplink with
 10:27:22 9 whatever sort of message they want to put in the message
 10:27:25 10 field in advance of ever serving anything to any customer.

10:27:28 11 So, we get a deeplink. The customer decides
 10:27:33 12 what the subscribe word should be. They put the subscribe
 10:27:36 13 word in. And that's a static link that goes out to all the
 10:27:39 14 customer -- all the users that the customer wants to serve
 10:27:41 15 it to.

10:27:42 16 They show that in the Complaint. We've shown
 10:27:45 17 how that's all they plead about, what's in the Complaint.
 10:27:48 18 But the claims require this customization that they're now
 10:27:52 19 relying on to show how they have a complicated system that's
 10:27:55 20 inventive. And what they've pled is that Emotive doesn't
 10:27:59 21 have that. And in the 118 case, when you have a pleading
 10:28:03 22 that's directly contradicted by what you say your claim is,
 10:28:07 23 when there's a contradiction between what you say you're
 10:28:10 24 accusing and what your claim requires, dismissal is
 10:28:12 25 appropriate, and that's why we asked for that.

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10:28:15 1 THE COURT: And, again, because what it sounds
 10:28:18 2 like here, part of what you were saying, it sounds like a
 10:28:21 3 non-infringement argument. But --
 10:28:23 4 MR. MARTINELLI: It's a pleading argument
 10:28:26 5 because they pled that the way the -- in the Complaint, the
 10:28:32 6 way the Emotive system operates is that the business that
 10:28:36 7 wants to create the deeplink using our service creates that
 10:28:40 8 ahead of time and chooses a subscribe word. That's in the
 10:28:45 9 Complaint. If you look at our briefing, we point where that
 10:28:47 10 is.

10:28:47 11 There's nothing in the Emotive system, and they
 10:28:50 12 don't plead anything that shows that the customization that
 10:28:54 13 they show here that they're now relying on as being their
 10:28:57 14 invention is performed by Emotive. In fact, the pleading
 10:29:01 15 shows that Emotive works a different way. It doesn't do
 10:29:03 16 this real-time customization. It has preset links.

10:29:07 17 THE COURT: Okay. And maybe on rebuttal, you
 10:29:11 18 could point me in your briefing where you made these points,
 10:29:14 19 and so I can make sure I take it into account. I guess
 10:29:18 20 one -- and you've used almost all of the rebuttal time, but
 10:29:21 21 I know, in fairness, we have two Defendants here. We want
 10:29:23 22 to make sure that they're able to make independent points
 10:29:27 23 about their cases. So, I'll give the Defendants' side and
 10:29:30 24 the Plaintiff's side a few extra minutes.

10:29:32 25 The one last question I need to ask you is: You

10:29:34 1 know, I think the asserted abstract ideas that the claims
 10:29:40 2 are directed to, in Defendants' view, you have slightly
 10:29:43 3 different ideas. But I'll just use Postscript's for now,
 10:29:46 4 but they're similar. You know, something like you've said,
 10:29:52 5 streamlining the process for a customer to enroll in a
 10:29:55 6 marketing promotion providing a pre-filled and pre-addressed
 10:29:59 7 request.

10:30:01 8 Postscript's here is the same. That's what they
 10:30:03 9 address. That's what these claims focus on. That's what
 10:30:05 10 this patent is all about. It's simply about the broad
 10:30:07 11 concept of streamlining the process for a customer to enroll
 10:30:10 12 in a marketing promotion by providing a pre-filled and
 10:30:14 13 pre-addressed request.

10:30:15 14 And if you look at everything about the patent,
 10:30:16 15 the patent's title, its abstract, its background, it's
 10:30:20 16 saying, We're about something more narrow than that. Right.
 10:30:24 17 We're about the use of these custom-generated deep links to
 10:30:28 18 do that.

10:30:29 19 And I guess the thing that I have trouble
 10:30:32 20 reconciling is, you know, if a patent's title was popcorn
 10:30:38 21 and it's -- you know, its abstract says, We're about
 10:30:42 22 popcorn. And the claim says, Popcorn, popcorn, popcorn.

10:30:45 23 And then the Defendant said, This is a patent
 10:30:47 24 about food. It would just seem off. Like, how can the
 10:30:51 25 focus of the thing not include reference to the thing that

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10:30:56 1 the patentee keeps saying the patent is all about?
 10:30:59 2 Is there anything you can say in response as to
 10:31:01 3 why it is fair to say the patent is mostly directed to the
 10:31:04 4 kind of more abstract idea that you're talking about?
 10:31:08 5 MR. MARTINELLI: I think the way to get at that
 10:31:10 6 is if you take an abstract idea, like we articulated it in
 10:31:14 7 the briefs, you can't get a patent for just applying it to
 10:31:17 8 every new piece of technology that comes along. And here,
 10:31:21 9 that's what they did.

10:31:22 10 So, what you're pointing to where they're
 10:31:24 11 saying, No, it's a custom message in this context of an SMS,
 10:31:28 12 well, that's just applying that abstract idea of creating a
 10:31:31 13 custom message just like a postcard and applying it to using
 10:31:35 14 an SMS on a computer.

10:31:37 15 If ten years from now everybody's using AR/VR
 10:31:41 16 and somebody says, Oh, I want to create a custom message
 10:31:44 17 that uses the AR/VR environment to do it and just takes that
 10:31:48 18 same idea and says, Oh, here's how in the AR/VR environment,
 10:31:52 19 you create a custom message. That would have the same
 10:31:54 20 problem.

10:31:55 21 So, I think fundamentally when you look at it,
 10:31:57 22 the concept over and over again streamlining and making
 10:32:01 23 things go smoothly. The only technology that actually makes
 10:32:04 24 things go smoothly in here is the deeplinks, which they
 10:32:07 25 admit they didn't invent, right. Like that's really where

10:32:09 1 the technology gives you the smooth interaction because it
 10:32:13 2 gives you a link that you click. It opens up your SMS tool
 10:32:18 3 and then you hit send.

10:32:19 4 That's what a deeplink does. That's the heart
 10:32:23 5 of the smoothness that they want to do. And I think
 10:32:26 6 applying that to just the world of a mobile phone where you
 10:32:30 7 have an SMS isn't anymore of an eligible concept than if you
 10:32:34 8 applied it to postcards, or if you applied to the telegraph
 10:32:37 9 or if you applied it to any other technology that happens to
 10:32:40 10 come along.

10:32:41 11 THE COURT: Okay. All right.

10:32:42 12 Thank you, Mr. Martinelli. We'll leave it
 10:32:44 13 there. I'll give the Defendants' side an additional five
 10:32:48 14 minutes, the Plaintiff's side as well.

10:32:50 15 Let me hear from Plaintiff's counsel.

10:32:56 16 MR. WEINBERG: Good morning, Your Honor.
 10:32:57 17 Jonathan Weinberg for Plaintiff, Attentive Mobile. It's a
 10:33:03 18 little bit tough to respond to all of that. There's a lot
 10:33:05 19 going on there. There's a lot of trial mixing between the
 10:33:10 20 101 doctrines.

10:33:12 21 But I think that, ultimately, what the argument
 10:33:14 22 here is is that each one of these components was a known web
 10:33:19 23 technology, and, therefore, it would have been obvious to
 10:33:23 24 arrange them together in this combination to make a new
 10:33:28 25 sign-up system. And that's, obviously, an obviousness

10:34:40 1 very clear invention narrative, right. They discuss at
 10:34:42 2 least two prior art systems for getting mobile sign-ups.
 10:34:49 3 That is a website approach and vendor application approach.
 10:34:55 4 If you look at the specification, the Complaint
 10:34:56 5 and the articles attached to the Complaint, at least in the
 10:34:59 6 Postscript Complaint, those do lay that out. So, it's worth
 10:35:04 7 just taking a moment to say what those prior art systems
 10:35:06 8 were and how this is different.

10:35:09 9 The traditional system is a website. So, you're
 10:35:11 10 browsing, you click on a link that redirects you to another
 10:35:17 11 website where you have to enter in the information, your
 10:35:19 12 phone number. Because of the laws involved here, it has to
 10:35:23 13 be a verification. So, the system would send you a text
 10:35:27 14 message saying, Please reply yes in order to subscribe. You
 10:35:32 15 reply yes, and then you would be subscribed.

10:35:35 16 And so, we counted that. That's 13 taps, and
 10:35:38 17 that's a problem. The Complaint talks about that in
 10:35:43 18 Paragraph 37 about how it requires the user to enter a phone
 10:35:45 19 number. It messages.

10:35:46 20 The other approach is you download an
 10:35:49 21 application, and you enter in a user name, a password. You
 10:35:53 22 sign up and it's able to then send you messages. This is
 10:35:57 23 discussed in the articles that were attached to the
 10:36:01 24 Complaint at Footnotes 4, 5 and 6, this vendor application
 10:36:05 25 approach.

10:33:32 1 analysis. It's not a 101 analysis.

10:33:34 2 101 analysis asks something different. It says:
 10:33:37 3 Is this a result? Are you trying to patent the idea of
 10:33:41 4 mobile sign-up where it does not matter what process or
 10:33:46 5 machinery that result is accomplished? And I'd like the --
 10:33:50 6 THE COURT: Streamlining mobile sign-up,
 10:33:53 7 streamlining email, that's what the Defendants are saying
 10:33:55 8 essentially is this is all about. It's directed to, you
 10:33:58 9 know, streamlining a process where a customer can enroll in
 10:34:01 10 a marketing promotion.

10:34:03 11 MR. WEINBERG: Well, I think that's true.

10:34:04 12 That's the way they phrase it.

10:34:06 13 THE COURT: That's how they're framing it.

10:34:07 14 MR. WEINBERG: The same way. But that's a goal,
 10:34:09 15 right. You want to build a better mousetrap. The goal is
 10:34:11 16 not -- it's not directed to the idea of improving
 10:34:15 17 mousetraps. It's new implementation of a mousetrap.

10:34:18 18 So, this is a new improved mobile sign-up
 10:34:20 19 system. And I think that where Mr. Novikov started is
 10:34:24 20 exactly the place to start. What did the inventors say the
 10:34:27 21 problem was? What was the prior art and how did they
 10:34:30 22 improve upon it?

10:34:31 23 The phrasing that I like from the Federal
 10:34:33 24 Circuit is how a solution specifically improves the function
 10:34:36 25 of the prior art systems. And, here, the pleadings have a

10:36:05 1 Now, both of these had problems. All right.

10:36:07 2 The problems are also laid out in the pleadings, again, in
 10:36:10 3 the specification, the Complaint and the articles. For
 10:36:13 4 example, the introduction, which we talked about, said it
 10:36:16 5 was burdensome to type out all these numbers for your phone
 10:36:19 6 number. The Complaint, Paragraph 37, says you also had
 10:36:23 7 typos in those phone numbers. This was a problem.

10:36:25 8 And so, there was --

10:36:27 9 THE COURT: Just to stop you there, and I guess
 10:36:30 10 he talked about this, Mr. Novikov, a little bit. There's
 10:36:33 11 one way to look at what like Column 1 is saying, that what
 10:36:39 12 it is emphasizing in terms of what is different or what the
 10:36:44 13 patent does is simply about saving time and saving typing or
 10:36:54 14 taps.

10:36:56 15 There may be another way to look at it that,
 10:36:58 16 yeah, it's about that, but it's also about a fundamentally
 10:37:04 17 different way that computers are working to get you to a
 10:37:08 18 place in which you might be saving time. The Defendant is
 10:37:15 19 emphasizing, I think, the former. Let's save time. Let's
 10:37:17 20 do it faster. Right. I think you're emphasizing the
 10:37:22 21 latter.

10:37:22 22 Is it an improvement in computer functionality?
 10:37:26 23 If it is the latter, exactly how is it the latter?
 10:37:30 24 MR. WEINBERG: Well, so I'd just like to make a
 10:37:33 25 distinction there between the two inquiries. The

1 specificity is this specific combination and a separate
 2 inquiry recognized by the Federal Circuit as: Is this a
 3 specific improvement to technology? Is this a new
 4 technology?

5 So, those are separate. And we've been talking
 6 about the specificity inquiry.

7 If we switch over to the technical invention
 8 inquiry, as you already noted, and *BASCOM* is probably most
 9 familiar to you, that arranging known components in a new
 10 combination that achieves an improvement is an inventive
 11 concept. Because, as the Supreme Court recognized in *KSR*,
 12 all inventions ultimately are some combinations of known
 13 components. And there's no requirement that in order to be
 14 eligible, one of these components has to be a new kind of
 15 deeplink, or a new kind of text messaging application, a new
 16 kind of server.

17 Software applications are patent eligible. We
 18 see that throughout the case law. Even *DDR* was the first
 19 post-Alice case to discuss the technical requirement,
 20 introduce the technical requirement into the jurisprudence.

21 And what was that? It was a web application,
 22 right. It wasn't a new kind of computer, a new kind of
 23 chip.

24 The next case to talk about it was *Enfish*. That
 25 was a new database application. It wasn't a new operating

10:40:29 1 I guess I'm wondering what you think it is that
 10:40:31 2 was the significant functionality add that the claims
 10:40:36 3 utilized vis-à-vis the way prior computer systems worked.
 10:40:41 4 It seems like Column 1 is saying, Prior system you would
 10:40:44 5 click on something and it would take you to a page in which
 10:40:46 6 you had to type in a lot of info.

10:40:48 7 Here, we're utilizing a system where you click
 10:40:51 8 on something, and a custom text message is generated
 10:40:54 9 vis-à-vis certain technology.

10:40:56 10 The other side would say, Well, that's kind of
 10:41:00 11 the same things. I think you're saying, No, they're a
 10:41:04 12 different thing.

10:41:05 13 How are they different? In what way are they
 10:41:07 14 meaningfully different?

10:41:08 15 MR. WEINBERG: I guess I'm not sure why they
 10:41:09 16 would be the same thing at all. The do-it-on-the-computer
 10:41:12 17 claim just says, I want to take an abstract concept, do it
 10:41:16 18 faster by using a computer.

10:41:17 19 But now, these prior art systems also used
 10:41:21 20 computers. So, how could this be a do-it-on-a-computer
 10:41:24 21 claim? They're all using computers. They're using them in
 10:41:28 22 a different way.

10:41:28 23 That's exactly what the 101 inquiry is supposed
 10:41:31 24 to be guarding against. It's supposed to say, Look, you can
 10:41:33 25 only patent one specific new way, a better mousetrap.

10:38:52 1 system or a new processor. And it goes on and on and on,
 10:38:56 2 and it makes sense.

10:38:57 3 Just as an aside, too, maybe this is something
 10:39:00 4 we can discuss later, I think the technical invention
 10:39:03 5 inquiry was not only difficult to apply, but also seems a
 10:39:06 6 bit contrary to Supreme Court case law.

10:39:09 7 *Bilski*, for example, an improvement to business
 10:39:12 8 method not involving computers at all. Is it eligible? So,
 10:39:15 9 it's not exactly clear what this inquiry is even about, but
 10:39:18 10 I'll save my quantification for another time.

10:39:22 11 THE COURT: I guess maybe what I'm trying to get
 10:39:25 12 at is, you know, in different ways, I think the law is
 10:39:28 13 asking us, and maybe this is more often a step two, but it's
 10:39:37 14 asking us to try to understand what is the difference
 10:39:43 15 between the assertedly inventive claim from the way
 10:39:47 16 computers were used before?

10:39:50 17 And maybe the reason why it's asking us that
 10:39:52 18 question is we know that just saying, Do it on a computer,
 10:39:57 19 it would be faster on a computer, isn't enough for the
 10:40:00 20 Supreme Court. And so, if you can demonstrate that the
 10:40:05 21 utilization of computer software was unconventional, maybe
 10:40:13 22 that's a way of demonstrating it's not just like pending, do
 10:40:16 23 it on a computer, i.e., abstract idea, plus nothing that
 10:40:21 24 matters. It's about pending something significant vis-à-vis
 10:40:26 25 the way that the computer is used.

10:41:36 1 And so, if you could put up our favorite diagram
 10:41:40 2 showing -- and just to be clear about what this diagram is,
 10:41:43 3 this is not meant to be a place to show exactly every single
 10:41:47 4 limitation of all three patents across all embodiments.
 10:41:50 5 This is an exemplary embodiment according to the '887
 10:41:54 6 patent.

10:41:54 7 And so, to the extent that there's some
 10:41:57 8 variances, it's not the point of this technological exhibit.
 10:42:02 9 What this is trying to show is that if all we wanted to
 10:42:05 10 claim was sending a pre-filled request, then we would just
 10:42:10 11 have Number 7, right. At the bottom, that's a custom
 10:42:13 12 message that is sending a pre-filled request from.

10:42:15 13 THE COURT: You're saying, We're about a
 10:42:17 14 particular way of getting there --

10:42:17 15 MR. WEINBERG: Right.

10:42:19 16 THE COURT: Of making that happen.

10:42:20 17 MR. WEINBERG: Right, right. Yeah.

10:42:21 18 And if you look at Mr. Novikov's slides, by the
 10:42:23 19 time you get to Slide Number 2, I think they've already lost
 10:42:26 20 that argument. Because even if you just say, Just one of
 10:42:30 21 the ways that you get there is by using a deeplink to a text
 10:42:34 22 messaging application that creates a pre-filled message.

10:42:38 23 By itself, that is different than the prior art.

10:42:43 24 It can't be disputed at this junction in the proceedings
 10:42:46 25 that that's unconventional. We have that in the pleading

10:42:49 1 over and over. It's unconventional. It results in a
 10:42:52 2 specific fact issue.
 10:42:55 3 There's no argument that's generic. We have
 10:42:58 4 other ways, other prior art systems that don't use the deep
 10:43:00 5 links to pre-fill the requests. And, therefore, it's not a
 10:43:04 6 generic way to make a subscription request. And so, because
 10:43:09 7 even just that one limitation standing on its own is
 10:43:12 8 non-generic, non-conventional, I think we pass the
 10:43:16 9 specificity of right test.

10:43:17 10 THE COURT: Just looking at your slide here, I
 10:43:19 11 don't think you're disputing that integration tags were
 10:43:21 12 known at the time, or that websites were known at the time
 10:43:24 13 or that the concept of transferring back user data from one
 10:43:29 14 place to another was not known.

10:43:32 15 What I wonder, though, you know, Mr. Martintelli
 10:43:34 16 says, embedding integration tags into a web page such that
 10:43:38 17 when a user accesses the web page, user data is then sent
 10:43:41 18 back to the server, he says that was known. That's like
 10:43:44 19 using cookies in a website, and the record is clear that
 10:43:46 20 that was all known.

10:43:47 21 Do you agree?

10:43:48 22 MR. WEINBERG: I don't know. That's a fact
 10:43:51 23 issue about whether or not that was conventional. But
 10:43:54 24 the --

10:43:55 25 THE COURT: You think there's at least a fact

42
 10:43:58 1 issue. It's not clear that it is. You think it's a
 10:44:00 2 disputed question.
 10:44:02 3 MR. WEINBERG: Well, standing here, I don't
 10:44:03 4 know. I can't say that, but I will say that our briefing
 10:44:05 5 did not rely on the non-conventionality of any one piece in
 10:44:09 6 isolation.

10:44:10 7 THE COURT: Right, but I'm adding pieces
 10:44:12 8 together. I'm adding pieces one, two and three together,
 10:44:15 9 right.

10:44:15 10 So, I'm saying: Were integration tags known?
 10:44:18 11 Yes. I don't think you're disagreeing.
 10:44:20 12 Now, I'm kind of adding together the taking of
 10:44:23 13 the integration tags, embedding it into a web page and then
 10:44:26 14 having user data that relates to that integration tag be
 10:44:30 15 sent back to a server when someone accesses the web page.
 10:44:32 16 So, I'm putting together steps one through three, and I'm
 10:44:35 17 asking: Was the combination of those steps known? I think
 10:44:37 18 you're saying, I don't know. Maybe not. It's not clear in
 10:44:40 19 the record that it was.

10:44:41 20 MR. WEINBERG: It's not clear -- perhaps it was,
 10:44:43 21 perhaps it wasn't. But the idea of doing that, so why do
 10:44:46 22 you have that step here, for example? If your browser is an
 10:44:52 23 IOS browser versus an Android browser, you're going to have
 10:44:55 24 to have a different kind of custom deeplink. So, some of
 10:44:58 25 the information that gets passed along might be: What kind

10:45:01 1 of phone do you have? Right.
 10:45:02 2 So, this is some data that comes back across in
 10:45:06 3 order to create that custom URI.
 10:45:07 4 THE COURT: Is the point of sending user data
 10:45:10 5 back to the server because we may use that user data in that
 10:45:13 6 custom-generated text message? Is that part of the point of
 10:45:16 7 it?
 10:45:17 8 MR. WEINBERG: I believe so, yes.
 10:45:18 9 THE COURT: And we're not required to use that
 10:45:21 10 user data, right, because we could also use information
 10:45:23 11 about the particular web page, at least per Claim 1 of the
 10:45:26 12 '887; right?
 10:45:28 13 But wouldn't you when you generate the custom
 10:45:29 14 text message?
 10:45:30 15 MR. WEINBERG: I don't want to get into claim
 10:45:32 16 construction, but the phrase user data is defined in the
 10:45:35 17 specification to include perhaps specifically referring to
 10:45:38 18 the web page and things like that. That will get deep into
 10:45:41 19 claim construction. But, yeah, part of it --
 10:45:43 20 THE COURT: Well, I'm just talking about like if
 10:45:45 21 we're using Claim 1 of the '887 as a representative claim, I
 10:45:48 22 think, isn't the claims requirement that the message body
 10:45:56 23 includes an identifier associated with at least one of the
 10:46:00 24 web page or the user data; right?
 10:46:03 25 MR. WEINBERG: Yeah.

43
 10:46:03 1 THE COURT: You don't have to use the user data
 10:46:05 2 in a custom text message. We could use data relating to the
 10:46:09 3 website that the user -- actually, it seems like the claims
 10:46:12 4 differentiate between those two things; is that right?
 10:46:14 5 MR. WEINBERG: Potentially, yes. As I said,
 10:46:16 6 this is an embodiment. You couldn't capture both of those
 10:46:19 7 necessarily.
 10:46:20 8 THE COURT: Sure.
 10:46:20 9 MR. WEINBERG: But this is something that once
 10:46:22 10 we get past the pleadings -- so, we -- the parties can
 10:46:25 11 discuss the claim construction and discuss, as the Court
 10:46:28 12 becomes more familiar with this technology, what the claims
 10:46:30 13 require and so forth.
 10:46:32 14 But the emphasis that we made is that, Look,
 10:46:35 15 this entire combination was not known. This is a better
 10:46:41 16 mousetrap. Yes, the component pieces, software existed,
 10:46:45 17 computers existed, servers existed, but that can't be the
 10:46:48 18 test for patent eligible improvements.

10:46:51 19 THE COURT: I think the thing I'm trying to get
 10:46:53 20 at with my questions is I definitely understand your point
 10:46:56 21 that, like, for example, at step two, this is an ordered
 10:46:59 22 combination case. It's not enough simply to look at the
 10:47:02 23 case and say, Well, this particular element of the claim was
 10:47:04 24 known. This particular element of the claim was known.
 10:47:07 25 It's the putting together of all of them by way

10:47:09 1 of a computer software package that does one, then the next,
 10:47:13 2 then the next, then the next. That was new and different.
 10:47:16 3 I think that's a part of your argument. Am I
 10:47:19 4 wrong?
 10:47:19 5 MR. WEINBERG: That's correct, but it's not
 10:47:20 6 limited to step two.
 10:47:21 7 THE COURT: No, okay. But for all significant
 10:47:25 8 purposes, but now what I'm trying to explore is exactly
 10:47:28 9 which of the combination of elements are you saying was
 10:47:31 10 unconventional?

10:47:33 11 Like, for example, you could be saying, Look, I
 10:47:36 12 give it to you. Step one up there on the screen, that was
 10:47:39 13 conventional. Step two is conventional. Step three was
 10:47:42 14 conventional. And even putting together steps one, two and
 10:47:46 15 three was conventional. And then step four was
 10:47:48 16 conventional, and steps five, six and seven. And even
 10:47:51 17 putting five, six and seven together was conventional.

10:47:51 18 But you know what wasn't conventional? Putting
 10:47:56 19 together one, two, three, four, five, six and seven all
 10:47:56 20 together. You could be saying that.

10:47:57 21 Or you could be saying, No no, no. Look, yes,
 10:47:59 22 putting together all those steps, that was unconventional.
 10:48:02 23 But independently, it was unconventional to do one, two and
 10:48:05 24 three together. It was unconventional to do four, five, six
 10:48:07 25 and seven together. And it was surely unconventional to put

10:49:21 1 MR. WEINBERG: Yeah.
 10:49:22 2 THE COURT: -- even on a mobile messaging
 10:49:23 3 application, that was known and used, but what wasn't used
 10:49:26 4 was? How would you frame it?
 10:49:28 5 MR. WEINBERG: Let me step back one second.
 10:49:32 6 THE COURT: Sure.
 10:49:33 7 MR. WEINBERG: A deeplink, typically you would
 10:49:34 8 have seen it -- you go to a web page, for example, your
 10:49:37 9 banking site's web page. And it says, you know, it would be
 10:49:40 10 better if you used the application.
 10:49:41 11 So, you have a little link at the top. You
 10:49:43 12 click on it and it opens up your application, the mobile
 10:49:46 13 app. That's a deeplink. So, that's a general technology
 10:49:49 14 like the Internet or --
 10:49:53 15 THE COURT: Right.
 10:49:54 16 MR. WEINBERG: The idea of having a deeplink
 10:49:56 17 that was given to you by this tech server that will open up
 10:50:01 18 a text messaging application, pre-address it and pre-fill in
 10:50:05 19 the information needed to subscribe to something, and then
 10:50:11 20 you were to subscribe by sending it, that use of deeplinking
 10:50:16 21 technology was not conventional.
 10:50:18 22 THE COURT: It seems like there you're talking
 10:50:20 23 about three things together: Deeplinking technology, to
 10:50:22 24 generate a text message and that the text message had custom
 10:50:26 25 data in it, data that's particularly associated with your

10:48:10 1 them all together.
 10:48:11 2 You could be making different arguments about
 10:48:13 3 exactly which combinations are unconventional use of
 10:48:18 4 computer technology to solve a computerized problem. I'm
 10:48:20 5 just trying to figure out which one you're saying or which
 10:48:23 6 argument you're making.

10:48:23 7 Do you know what I mean?

10:48:25 8 MR. WEINBERG: Yeah, I understand. I think the
 10:48:26 9 problem, the reason I keep coming back to the full
 10:48:28 10 combination is simply because that's the easiest thing for
 10:48:31 11 me to prove, and it will be sufficient to get past this
 10:48:33 12 motion. So, that's why I seem to be hedging a little bit on
 10:48:39 13 saying that specific pieces of it might be unconventional.

10:48:42 14 THE COURT: Okay.

10:48:42 15 MR. WEINBERG: Certainly, I would point to the
 10:48:44 16 end there, as Mr. Novikov's slide identified it, using a
 10:48:48 17 deeplink to create a custom text message whereby the user
 10:48:53 18 can subscribe with one click was unconventional. That's key
 10:49:00 19 to all of the claims across the patents. They all have that
 10:49:04 20 limitation. And that by itself was not a conventional use
 10:49:09 21 of deeplinking technology. Deeplinks existed, just they
 10:49:13 22 were not used this way to create sign-ups.

10:49:15 23 THE COURT: What way weren't they used?

10:49:16 24 Deeplinks were used, meaning the concept of transitioning
 10:49:19 25 from one application to another --

10:50:31 1 user or perhaps the website that the user was looking for.
 10:50:33 2 It's those three pieces that together were not
 10:50:36 3 known and being done?

10:50:36 4 MR. WEINBERG: Can I clarify that third piece
 10:50:39 5 just a little bit? I would say that the text message is
 10:50:43 6 sendable to subscribe to a service.

10:50:45 7 THE COURT: Okay. So, the use of deeplinking to
 10:50:48 8 get to a tech message that was sendable to subscribe a
 10:50:53 9 service, that was unconventional?

10:50:54 10 MR. WEINBERG: Right. That was unconventional
 10:50:56 11 and it's not generic. So, I want to make sure that when I
 10:51:01 12 use the terms generic and conventional, I'm maybe using them
 10:51:04 13 in a slightly different way than my colleagues here are.

10:51:07 14 When I say generic, I mean inherent, common to
 10:51:10 15 the genus, right. Every solution has this limitation
 10:51:15 16 because it's generic.

10:51:15 17 THE COURT: Every computer can collect data.
 10:51:17 18 Every computer can process data. Every computer can send
 10:51:20 19 data.

10:51:20 20 MR. WEINBERG: Right.

10:51:21 21 THE COURT: That would be the kind of generic
 10:51:22 22 use of the user technology that the Federal Circuit says,
 10:51:26 23 I'm not going to add.

10:51:27 24 MR. WEINBERG: The *Customedia* that they cited in
 10:51:31 25 their last brief, in order to get information down from one

10:51:32 1 computer to another computer, you'll need two computers, a
 10:51:34 2 sending computer, and a receiving computer. So, and those
 10:51:38 3 are generic limitations.

10:51:39 4 THE COURT: So, I did want to, since you
 10:51:40 5 mentioned it, one of my questions was about *Customedia*.
 10:51:43 6 What is the cleanest, easiest to understand way to
 10:51:47 7 distinguish the decision there from what's going on here?

10:51:50 8 MR. WEINBERG: *Customedia* was a very easy
 10:51:53 9 decision, I think, because the claims there were directed to
 10:51:58 10 sending advertisements to a user, right. I think the
 10:52:02 11 Federal Circuit said directed to the idea of using a
 10:52:08 12 computer to deliver targeted advertisements to a user.

10:52:13 13 THE COURT: Well, the Plaintiff there has
 10:52:14 14 suggested that the claim's add of having a particular
 10:52:18 15 section of the receiving, I think it was the server, devoted
 10:52:22 16 to only advertising data was kind of the extra piece that
 10:52:26 17 was relevant. The Federal Circuit said, No, that wasn't
 10:52:30 18 enough.

10:52:31 19 MR. WEINBERG: Yeah, that was a step two. They
 10:52:33 20 didn't address it too much. They touched on step two.

10:52:36 21 But at step one, the reason why this was an easy
 10:52:38 22 decision is because the idea of the delivering
 10:52:43 23 advertisements. And what did they add? They added a
 10:52:45 24 sending computer and a receiving computer.

10:52:48 25 And so, those are generic limitations, but

10:52:50 1 they're both required in order to computerize the idea of
 10:52:53 2 sending advertising data. And there was nothing else.

10:52:56 3 And so, it's our position that when you're doing
 10:52:59 4 this analysis, it's okay to weed out generic limitations
 10:53:02 5 because generic limitations simply spell out the abstract
 10:53:06 6 idea. And that's all there was in *Customedia*.

10:53:08 7 There was a bit of additional dicta in
 10:53:14 8 *Customedia* about user experience and stuff that was cited in
 10:53:19 9 the letter brief. And then there was the step two inventive
 10:53:23 10 concepts raised by the patentee there which said, We store a
 10:53:27 11 dedicated area. And I don't think the Federal Circuit said
 10:53:30 12 much about that other than it's not inventive. They didn't
 10:53:34 13 really explain why. I think it's only one paragraph.

10:53:37 14 THE COURT: Step two is definitely shorter than
 10:53:39 15 Paragraph 1. I thought maybe that concept of dedicated
 10:53:42 16 storage was addressed in both steps.

10:53:45 17 But, I mean, is a difference that -- I mean, one
 10:53:50 18 of the pieces that, you know, we look to -- the Federal
 10:53:53 19 Circuit looks to is: What does the patent say about whether
 10:53:59 20 or not the addition, the limitation in question, really was
 10:54:05 21 an unconventional, a step forward? Is there a difference in
 10:54:08 22 the patents that way?

10:54:08 23 MR. WEINBERG: Yeah. So, I'll get back to your
 10:54:10 24 question then.

10:54:11 25 The conclusion, the analysis the District Court

10:54:16 1 provided for *Customedia* is that you only had generic
 10:54:18 2 limitations. You did the same analysis here. Again, we're
 10:54:21 3 asking: Are these only generic limitations or are they
 10:54:24 4 conventional limitations?

10:54:25 5 We conclude on the pleadings that these are
 10:54:29 6 unconventional. We conclude just by looking at them and on
 10:54:32 7 the pleadings, because there are other alternative systems.
 10:54:35 8 This is not generic.

10:54:37 9 And so, there's a distinction from how
 10:54:40 10 *Customedia* was clearly just a generic limitation.

10:54:42 11 THE COURT: You mentioned the pleadings. You
 10:54:44 12 know, and there are a number of paragraphs, I think, in the
 10:54:46 13 pleadings where they attempt to address the issue of
 10:54:49 14 unconventionality.

10:54:49 15 Now, I think you'd agree if you had ten
 10:54:51 16 paragraphs in the Complaint, but every one of them said the
 10:54:53 17 following: The claims amount to the unconventional use of
 10:54:56 18 computer technology to solve a problem in the computer
 10:54:59 19 process, and then the next paragraph said the same thing,
 10:55:02 20 and the next paragraph said the same thing, the other side
 10:55:04 21 would say, and they'd be right, that those are conclusory
 10:55:07 22 assertions.

10:55:08 23 You can't simply say "X" is unconventional. You
 10:55:11 24 would have to say something more like, invoke facts, like
 10:55:15 25 "X", the use of "X", the computer will, obviously, do this

10:55:18 1 as unconventional, for example, or let me explain why.
 10:55:21 2 Because, see, what computers were doing at the time was A, B
 10:55:24 3 and C. What they weren't doing, what it was difficult to do
 10:55:27 4 was, you know, C, D, E and F. And here's how the patent is
 10:55:32 5 when the inventors did that.

10:55:33 6 If I'm looking in your Complaint, what's the
 10:55:35 7 best place where you'd say, This isn't just a conclusory
 10:55:38 8 statement about unconventionality, this is actual specific
 10:55:41 9 factual allegations that make it plausible that this was the
 10:55:45 10 unconventional use of computers? What's the best place to
 10:55:48 11 look to?

10:55:48 12 MR. WEINBERG: So, absolutely. I think that the
 10:55:51 13 legal standard is plausible. So, it's conclusory and it's
 10:55:55 14 not plausible, then that might be an issue. But we're
 10:55:58 15 looking at: We gave this conclusion. Is it plausible?

10:56:01 16 I would just say that Paragraphs 36 and 37 of
 10:56:04 17 the Complaint discuss shortcomings of the way the systems
 10:56:08 18 were being done, systems were being implemented at the time.
 10:56:12 19 And by saying that, at the time there was this website
 10:56:19 20 methodology, there was a vendor application methodology, and
 10:56:23 21 that caused typos. I think the implication there is that by
 10:56:27 22 providing a system where that was not the website
 10:56:30 23 methodology, that did not involve causing typos to occur,
 10:56:36 24 and that was less burdensome is unconventional.
 10:56:39 25 I would also encourage the Court to also

10:56:44 1 consider the articles that we referenced in the Complaint
 10:56:47 2 for Postscript. There's four articles at Footnotes 4, 5 and
 10:56:52 3 6. The article at Footnote 4 calls the system novel, and
 10:56:58 4 that's verification on a fact issue from the pleadings.

10:57:03 5 And the article at Footnote 5 calls a key
 10:57:09 6 differentiator.

10:57:10 7 Footnote 6 includes a line, this idea of this
 10:57:13 8 streamlined process sounds simple, but took months for
 10:57:17 9 engineers to develop. And so, that third-party verification
 10:57:22 10 is part of the Complaint, part of the pleadings, and that
 10:57:26 11 suggests that what we're saying here is absolutely true.

10:57:29 12 THE COURT: I think, you know, sometimes when
 10:57:31 13 we're asked to look at allegations that something was novel
 10:57:34 14 or a differentiator, you know, obviously, there's a
 10:57:36 15 difference between novelty and eligibility that the lines
 10:57:39 16 get blurred sometimes. But I think, at a minimum, one would
 10:57:43 17 have to make it clear enough that the reference to novelty
 10:57:48 18 by an accomplisher is really a reference to the different or
 10:57:53 19 unconventional ways that computer software was being used to
 10:57:56 20 solve a problem. That's why it's done.

10:57:59 21 So, novelty, as it gets to relevant
 10:58:03 22 particularity or specificity in the 101 context, is
 10:58:08 23 relevant. Novelty in terms of this is a new, abstract idea
 10:58:11 24 isn't.

10:58:11 25 And I guess the question, like, I think your

10:59:31 1 to conventionality in step two, and that's the question that
 10:59:35 2 you just asked about.

10:59:36 3 So, we did quote them, I think, in both briefs,
 10:59:40 4 all three articles.

10:59:41 5 THE COURT: You have a couple minutes left,
 10:59:42 6 Mr. Weinberg, about five minutes or so, so let me just let
 10:59:45 7 you continue.

10:59:47 8 MR. WEINBERG: All right. If there's a specific
 10:59:50 9 question on your mind, I'm more than happy to address it.
 10:59:53 10 Otherwise, I'll guess at it with other questions that were
 10:59:56 11 asked.

10:59:56 12 THE COURT: No. I mean, I have a few questions
 10:59:58 13 left, but I want to make sure that you get a chance to make
 11:00:03 14 the points you wish before you sit down. If there's
 11:00:06 15 anything further you want to add, any other followup to
 11:00:09 16 questions you wish to add?

11:00:11 17 MR. WEINBERG: Maybe the last item I'd like to
 11:00:13 18 make clear is that you see this argument a few times that
 11:00:19 19 the invention, the specific implementation of the invention
 11:00:22 20 is abstract and because it is an embodiment of the
 11:00:27 21 higher-level abstract idea. And that's backwards, right.

11:00:32 22 Every implementation is going to go through the
 11:00:35 23 steps required to implement the higher-level abstract idea.
 11:00:40 24 They have to show the opposite, that our specific limitation
 11:00:44 25 essentially preempts or, I don't want to use the word

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10:58:14 1 cite in Paragraph 51 of the Complaint is: How do I know
 10:58:15 2 what's being talked about there? You know, what kind of
 10:58:18 3 novelty? In what way were they saying it's novel?

10:58:21 4 MR. WEINBERG: Well, the articles do describe
 10:58:24 5 the entire two-tap system, and they say -- they go through
 10:58:27 6 how this is an improvement. You see that in, for example,
 10:58:30 7 the article at Footnote 4 at Page 1. It says it allows
 10:58:33 8 brands to lay out the shortest possible path to sign up.
 10:58:36 9 It's talking about the two-tap solution.

10:58:38 10 Same thing in Footnote 4 at Page 4, it talks
 10:58:41 11 about how its click-through rate is increased by 30 percent.
 10:58:46 12 The ROI increased by 25. Tenfold increase in revenue per
 10:58:46 13 messaging.

10:58:51 14 And the fact that this was -- these praises come
 10:58:56 15 immediately after description of the "two-tap system,"
 10:59:00 16 suggests that they, at least plausibly, that's the standard
 10:59:03 17 here, are talking about that innovation.

10:59:07 18 THE COURT: Did you talk much in your briefs
 10:59:08 19 about the particular content of these articles at length at
 10:59:13 20 Footnotes 4, 5 and 6. I know you referenced *Berner* 51
 10:59:17 21 sometimes, but did you get into that?

10:59:18 22 MR. WEINBERG: We quoted the articles in the
 10:59:20 23 sections discussing conventionality. And I know the other
 10:59:25 24 side pushed back quite a bit about novelty not being
 10:59:28 25 important here. But novelty is the question when it comes

11:00:47 1 preempt, but essentially tries to claim the whole abstract
 11:00:51 2 idea and adds only generic conventional and field of use
 11:00:54 3 limitations. And so, the proof is backwards. I just wanted
 11:00:57 4 to point that out.

11:00:58 5 THE COURT: You mentioned preemption. Maybe
 11:01:00 6 that's the last question I have which is, you know, that's
 11:01:02 7 the concern that drives the 101 inquiry.

11:01:07 8 The other side has said that these claims are
 11:01:09 9 directed simply to streamlining a process for a customer to
 11:01:12 10 enroll in a marketing promotion by providing a pre-filled
 11:01:15 11 and pre-addressed request. So, that's the idea assertedly
 11:01:20 12 at issue. We're going to streamline the process for
 11:01:22 13 somebody enrolling in a marketing promotion by way of a
 11:01:25 14 pre-filled and pre-addressed request.

11:01:26 15 So, the way I think about it is, maybe this is
 11:01:30 16 right or wrong, there must be lots of ways in the world that
 11:01:33 17 one could do something, patent something that relates to
 11:01:38 18 that idea. Lots of ways to try to streamline the process
 11:01:41 19 for enrolling in a promotion where you use a pre-filled or
 11:01:44 20 pre-addressed request.

11:01:45 21 I wonder how much of that whole that a
 11:01:50 22 representative claim here takes up. And I think if it could
 11:01:53 23 be shown that there's at least a question that the
 11:01:56 24 representative claim takes up not an undue amount of that
 11:02:01 25 whole, that might be very helpful for a patentee.

11:02:04 1 On the other hand, if it seemed like the
 11:02:06 2 representative claim and what it covered takes up quite a
 11:02:09 3 lot or nearly all of that whole, maybe a portion is for the
 11:02:15 4 patentee. I guess, my question is: Based on what's in the
 11:02:19 5 record from a preemption perspective, what could I glean
 11:02:23 6 from how much of the whole a claim like Claim 1 of the '887,
 11:02:27 7 might be said to take up and how much it doesn't? Do you
 11:02:30 8 know what I'm saying?

11:02:31 9 MR. WEINBERG: Yeah, a lot to unpack there. I
 11:02:33 10 would say preliminarily the Federal Circuit has held many
 11:02:38 11 times that a narrow abstraction idea is still an abstract
 11:02:42 12 idea.

11:02:42 13 The flip side of that is even if we take a large
 11:02:44 14 part of the art, the point of a patent is to monopolize some
 11:02:49 15 piece of the art. So, if we're entitled to a larger piece,
 11:02:53 16 because that's what's disclosed that that was the
 11:02:55 17 improvement, I think that's not necessarily going to be
 11:03:01 18 viewed to be ineligibility.

11:03:03 19 The prior art method of accomplishing this same
 11:03:09 20 goal, I think, are what I would point to most first and
 11:03:12 21 foremost. The two different, the old website approach and
 11:03:15 22 the vendor application approach, which have been done and
 11:03:20 23 used widely.

11:03:21 24 THE COURT: What you're calling "the vendor
 11:03:22 25 application approach," it's described where?

11:04:39 1 content, particular articles that are footnoted in the
 11:04:43 2 Complaint. And maybe you did, but I read the briefs very
 11:04:48 3 carefully. I'm not sure that I appreciated the particular
 11:04:51 4 substance of a particular article footnoted in the Complaint
 11:04:55 5 and why it was discussing a certain prior art strategy for
 11:04:58 6 using computer functionality that's different from what's
 11:05:00 7 described in Column 1, for example. So, I want to make sure
 11:05:03 8 I understand that.

11:05:03 9 MR. WEINBERG: So, are you talking about the
 11:05:05 10 vendor application approach or the website approach?

11:05:09 11 THE COURT: Well, to be honest, I'm not sure I
 11:05:11 12 understand the distinction. In other words, when I look at
 11:05:13 13 Column 1, I understand that that's the best place in the
 11:05:16 14 patent where the patentee is telling me, Here's what the
 11:05:19 15 prior art was doing. Here's why it had some downsides.
 11:05:22 16 Here's what we're going to do different.

11:05:24 17 And it talks about known methods allowing a user
 11:05:27 18 to open a vendor's application or website. And it goes on
 11:05:31 19 to say that what happens is then you open that application
 11:05:37 20 or website and you provide payment information via the
 11:05:41 21 application or website to complete a transaction.

11:05:44 22 But that approach has a downside because you
 11:05:48 23 have to pause your prior activities maybe on a mobile device
 11:05:52 24 and then you're redirected to the vendor's application or
 11:05:54 25 website. So, you're on your mobile device, then you get

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11:03:24 1 MR. WEINBERG: It's mentioned briefly in the
 11:03:26 2 specification, the application at the end of that
 11:03:30 3 introduction paragraph.

11:03:31 4 THE COURT: Where is it mentioned? I asked it
 11:03:36 5 because my memory of Column 1 is that it was talking about
 11:03:39 6 one prior art approach, but I think you're suggesting it
 11:03:42 7 references two different ones. And I'm not sure how to
 11:03:45 8 distinguish.

11:03:52 9 MR. WEINBERG: So, for example, redirected to
 11:03:54 10 the vendor's application or website, I think it's probably
 11:03:57 11 what I'm referring to at Line 43. But probably the best
 11:04:02 12 discussion of it is in the Complaint and in the articles
 11:04:06 13 that talk extensively about the vendor applications.

11:04:10 14 THE COURT: Which maybe before we -- I'll ask
 11:04:14 15 you when the other side is done with their rebuttal if
 11:04:18 16 there's a particular part of the Complaint that you would
 11:04:21 17 say makes reference to a different prior art strategy other
 11:04:25 18 than the one being described in Column 1.

11:04:27 19 MR. WEINBERG: Yeah.

11:04:28 20 THE COURT: Here's where we talk about it,
 11:04:31 21 Column 1. If you have it now, let me know. But if not --

11:04:33 22 MR. WEINBERG: Well, the articles are part of
 11:04:34 23 the Complaint.

11:04:35 24 THE COURT: I think the problem, though, is I
 11:04:37 25 think you're relying fairly heavily today on the particular

11:05:58 1 redirected to this separate page, you know, et cetera. And
 11:06:00 2 that's tough because you lose focus. And maybe it's also
 11:06:03 3 tough because you've got to type in a lot of info, and you
 11:06:05 4 get distracted, or you might mistype stuff.

11:06:08 5 That's a prior art approach using computers that
 11:06:10 6 has some downsides. We're going to fix them. I'm looking
 11:06:14 7 at it as like one approach. It's talked about at Column 1.
 11:06:18 8 I think you're telling me there's two different
 11:06:20 9 approaches that we think are pretty relevant to the
 11:06:22 10 Complaint, that one and another one. And I'm saying,
 11:06:25 11 Where's that other one?

11:06:26 12 Do you know what I'm asking?
 11:06:28 13 MR. WEINBERG: Yeah, yeah. Certainly, I would
 11:06:32 14 say Column 1 is not a hundred percent clear and with two
 11:06:34 15 different approaches. It becomes a little more clear when
 11:06:37 16 you read down the rest of the Complaint in those articles
 11:06:41 17 which have extensive discussion of vendor application being
 11:06:42 18 another approach.

11:06:44 19 But either way, even if the Court were to find
 11:06:46 20 that this vendor application was not specifically or
 11:06:48 21 sufficiently articulated, it still -- the one prior art
 11:06:52 22 approach, the website approach where you're filling in your
 11:06:54 23 phone number is still --
 11:06:55 24 THE COURT: Are you distinguishing -- are you
 11:06:57 25 saying two because you're distinguishing between a reference

11:07:00 1 to a vendor application versus a vendor website?
 11:07:02 2 MR. WEINBERG: Yes.
 11:07:02 3 THE COURT: Okay.
 11:07:03 4 MR. WEINBERG: So, each of those -- those are
 11:07:04 5 two different approaches, and they generated different
 11:07:08 6 problems?
 11:07:08 7 MR. WEINBERG: Well, so a vendor application
 11:07:12 8 would be you go to a website, and you go to an app store,
 11:07:15 9 and you download an application for your bank, and you
 11:07:17 10 create an account. And you -- it does have its own
 11:07:21 11 burdensome problems. It works differently than going to a
 11:07:23 12 website, filling in your phone number, receiving a text
 11:07:26 13 message, replying yes to it. Those are two different kinds
 11:07:30 14 of systems.
 11:07:31 15 THE COURT: Are they different in a material way
 11:07:32 16 for our purposes here?
 11:07:33 17 MR. WEINBERG: Well, only in that they are two
 11:07:36 18 different ways from each other and from the claimed method
 11:07:39 19 of accomplishing the same desired goal of enrolling
 11:07:43 20 customers.
 11:07:44 21 THE COURT: Got it. Okay.
 11:07:45 22 MR. WEINBERG: And --
 11:07:46 23 THE COURT: Sorry. You're out of time. Let me
 11:07:49 24 stop you there because I do want to -- is there anything,
 11:07:51 25 very briefly, that you want to add before you end?

11:07:54 1 MR. WEINBERG: Yeah. I just wanted to, before I
 11:07:56 2 sat down, to make the point that I think that the two
 11:07:58 3 different ways in which the Defendants are describing the
 11:08:01 4 abstract idea of streamlining the sign-up process is one.
 11:08:06 5 And streamlining the sign-up process using pre-filled
 11:08:10 6 requests is really the same. Because in this context when
 11:08:14 7 you're making a request, the only way to streamline it is to
 11:08:18 8 ask less of the user.
 11:08:19 9 So, that's just kind of a play on words.
 11:08:22 10 They're both talking about the goal of the invention and not
 11:08:25 11 about what the invention is directed to.
 11:08:27 12 THE COURT: Okay. All right. Thank you.
 11:08:29 13 MR. WEINBERG: Thank you.
 11:08:29 14 THE COURT: All right. Let me give
 11:08:32 15 Plaintiff's -- sorry, Defendant's counsel five minutes more.
 11:08:34 16 MR. NOVIKOV: I'm going to try to keep it under
 11:08:37 17 five minutes, if I can. I, too, was wondering, as I was
 11:08:47 18 reading the Plaintiff's briefs, what it was they were
 11:08:56 19 asserting was unconventional about the arrangement as are
 11:08:59 20 cited in the claims.
 11:09:00 21 And I was glad to hear Mr. Weinberg articulate
 11:09:04 22 it. And what he said, and I tried to write it down, was
 11:09:07 23 using a deeplink to create a custom text message that a user
 11:09:10 24 can use to subscribe to a service.
 11:09:13 25 That can't possibly be it. The notion of using

11:09:19 1 a deeplink to create a custom text message is in the record.
 11:09:24 2 That was known. Being able to pre-populate an SMS message
 11:09:29 3 was something specific as part of that standardized thing
 11:09:32 4 that they're making use of.
 11:09:33 5 THE COURT: So, I think you're saying custom
 11:09:36 6 text messages generated by a deeplink was known. How do you
 11:09:44 7 know that? Look at the Other Publications portion of the
 11:09:49 8 patent. Look at these words I've highlighted.
 11:09:55 9 I do see the words, and I at least see they say
 11:09:58 10 how to pre-populate an SMS message. I don't really know
 11:10:02 11 that these tell me that deeplink-generated text messages
 11:10:07 12 with custom user data was conventional.
 11:10:10 13 Do they tell me that?
 11:10:11 14 MR. NOVIKOV: Sure. I don't know whether --
 11:10:14 15 certainly, these words do not tell you that the text message
 11:10:20 16 that is populated has custom user data.
 11:10:23 17 I would point Your Honor to the *Secured Mail*
 11:10:26 18 case that's cited all over both sides' briefing that says in
 11:10:30 19 2001, a personalized URL, which is what that would be, was
 11:10:36 20 perfectly generic and conventional.
 11:10:38 21 THE COURT: And I know, obviously, that
 11:10:40 22 Defendants are handicapped at this 101 stage because one can
 11:10:43 23 only rely on the record, and the record really is the
 11:10:46 24 Complaint and exhibits attached thereto, et cetera.
 11:10:48 25 But I also wonder if, like, that's part of the

11:10:50 1 point like it might be true that you can show me pretty
 11:10:53 2 clearly, if you have an expert declaration you could append
 11:10:56 3 to a summary judgment motion, Hey, look, it's totally
 11:10:59 4 conventional.
 11:11:00 5 But that's not what we're doing at the Rule 12
 11:11:03 6 stage. I wonder, you know, how come maybe that's not what's
 11:11:05 7 going on here.
 11:11:06 8 MR. NOVIKOV: I totally understand the concern
 11:11:09 9 that, you know, you've got these three pieces. You have
 11:11:12 10 user data coming back, you've got a deeplink supposedly
 11:11:15 11 based on that, and you have the SMS being used to subscribe
 11:11:20 12 somebody.
 11:11:20 13 I totally understand the Court's concern that
 11:11:22 14 there's nothing in the record that one can point to and say,
 11:11:25 15 Ah-hah, that was conventional. And I appreciate that we're
 11:11:28 16 asking the Court to make a little bit of a leap.
 11:11:32 17 But I would just say the Court asked
 11:11:33 18 Mr. Weinberg, in 2017, was it known and conventional to have
 11:11:37 19 a web page that uses a cookie to send back user data? And
 11:11:41 20 Mr. Weinberg said, I don't know it's a fact issue.
 11:11:44 21 And I understand why he took that position. I'm
 11:11:46 22 not faulting him in any way, but I would just say that that
 11:11:50 23 is the sort of assertion that the Court does not have to
 11:11:54 24 accept as raising a plausible fact issue.
 11:11:57 25 THE COURT: Do you think the record makes it

11:11:59 1 clear that his assertion, that it could be a fact issue, is
 11:12:03 2 incorrect? Does the record clearly show me that utilizing
 11:12:10 3 integration tags and or a Third Circuit equivalent cookies
 11:12:16 4 and a website that are then sent back to the server when one
 11:12:22 5 accesses it was well known at the time?

11:12:23 6 MR. NOVIKOV: I think -- absolutely. I mean, I
 11:12:25 7 think the patent discusses the notion of sending of cookies,
 11:12:29 8 which are things that are sent back from a web page to a
 11:12:32 9 server. It doesn't explain what they are. Doesn't claim to
 11:12:35 10 invent them.

11:12:35 11 I think the Court might look at the *Bridge and*
 11:12:39 12 *Post* case, which is also cited in the briefing, which has a
 11:12:42 13 really nice discussion of how using a combination of
 11:12:48 14 perfectly conventional things where there's nothing about
 11:12:51 15 the claims or the specification that suggests that there's
 11:12:55 16 anything new going on in that technical combination is an
 11:12:59 17 inference that the Court can draw.

11:13:01 18 THE COURT: Mr. Novikov, you're almost at the
 11:13:03 19 end. If you want to make one last point.

11:13:05 20 MR. NOVIKOV: The only point that I would make
 11:13:07 21 is the Court sort of issued what I took to be a friendly
 11:13:11 22 implicit challenge to Mr. Weinberg to explain how these
 11:13:17 23 claims leave any room to use deeplinking to subscribe people
 11:13:22 24 to promotions on the Internet. And the answer came back
 11:13:27 25 sort of inconclusive.

11:25:33 1 copies, if you'd like.
 11:25:34 2 THE COURT: Please feel free to hand them up.
 11:25:34 3 Thank you.
 11:25:47 4 MR. DESAI: Good morning, Your Honor. Anish
 11:25:47 5 Desai representing movant, Palo Alto Networks. The
 11:25:52 6 improvement in the asserted patents here is not a technical
 11:25:55 7 solution. The patents claim a generic computing device
 11:25:59 8 called a probe that collects, filters, analyzes and
 11:26:03 9 transmits data. The solution is adding a human to analyze
 11:26:07 10 data, status data to figure out whether the data is benign
 11:26:11 11 or a threat, and then updating the computer based on the
 11:26:14 12 human's analysis.

11:26:16 13 This is not a mischaracterization or a
 11:26:19 14 oversimplification. That is what is in the claims, and
 11:26:23 15 that's how the invention -- the improvement is described in
 11:26:26 16 the specification.

11:26:27 17 THE COURT: I guess on that front, I know you
 11:26:29 18 said in your briefing, in terms of what the claims are
 11:26:32 19 about, the improvements, what makes this kind of a "good
 11:26:38 20 invention" from the patentee's perspective as described in
 11:26:41 21 the claim, you focus on the human elements, the human SOC.
 11:26:45 22 But, I mean, wouldn't it be correct to say that the
 11:26:49 23 invention is really about the combination of the
 11:26:52 24 computerized elements at the probe, plus the human element
 11:26:57 25 at the SOC and adding those two together?

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11:13:28 1 And I, too, think that if you look at these
 11:13:31 2 claims, you will find that it does occupy that field. And
 11:13:36 3 while that's not dispositive, I think it is something the
 11:13:38 4 Court should consider.

11:13:39 5 THE COURT: Okay. Thank you, Mr. Novikov. And
 11:13:43 6 thanks to counsel for both sides for their arguments.
 11:13:47 7 We'll transition to our second argument. But
 11:13:50 8 because we've got some moving pieces here to move around,
 11:13:54 9 why don't I take a short five-minute break to let everybody
 11:13:57 10 stretch their legs, accomplish that and use the restroom if
 11:13:59 11 you need to.

11:14:00 12 So, the Court will be in recess. We'll come
 11:14:04 13 back, say, around 11:20.

11:14:06 14 Okay. Thank you.

11:14:06 15 DEPUTY CLERK: All rise.

11:24:58 16 (A brief recess was taken.)

11:24:58 17 THE COURT: Please be seated. All right.

11:25:03 18 Now, we'll turn to our third case, but our
 11:25:06 19 second set of cases, which is case one, the BT case. Again,
 11:25:15 20 it's the Defendant's Rule 12 motion.

11:25:17 21 So, I will start and turn to counsel for each
 11:25:24 22 side. We allocated 20 minutes for argument for each side.
 11:25:27 23 Again, I'll let you know, again, when you have about five
 11:25:29 24 minutes left.

11:25:32 25 MR. DESAI: Your Honor, we have some printed

11:27:01 1 I think the other side would say it's about more
 11:27:03 2 than that. But even at a minimum, isn't it about computers
 11:27:07 3 plus humans in those ways?

11:27:08 4 MR. DESAI: And that's how we described it in
 11:27:10 5 our motion, which is collecting, filtering, analyzing and
 11:27:13 6 transmitting data and then making modifications based on the
 11:27:16 7 human feedback.

11:27:17 8 THE COURT: I think that's what they call kind
 11:27:18 9 of the two-level review process.

11:27:21 10 MR. DESAI: Sure. It's a computer that analyzes
 11:27:23 11 data. It doesn't tell you how it analyzes it. It just
 11:27:27 12 filters, analyzes to identify security-related events. And
 11:27:31 13 then for data that doesn't filter, which let's be honest,
 11:27:36 14 it's the good and the bad filter. And if it doesn't hit a
 11:27:38 15 good or a bad filter, you send it to the human.

11:27:40 16 THE COURT: "Bad" meaning like the filter will
 11:27:43 17 know in advance, this particular type of attack is known.
 11:27:46 18 We see it. That's bad. Block it.

11:27:49 19 There will be certain data that is not bad and
 11:27:51 20 understood, I guess, to be good that passes. That's the
 11:27:55 21 type of initial filtering step you're saying we have?

11:27:58 22 MR. DESAI: Yeah. You can see that in the
 11:28:00 23 Complaint, Your Honor, where they talk about the accused
 11:28:01 24 product, and they accuse what are called in the Complaint
 11:28:05 25 white lists and black lists in the accused products. And

11:28:09 1 those are terms that, I think, are a little bit out of
 11:28:12 2 favor, but they're used in the Complaint.
 11:28:14 3 And that's what the filtering is. It's
 11:28:16 4 traditional, the good and the bad list.
 11:28:19 5 THE COURT: And I think, at a very base level, I
 11:28:21 6 think like your side is saying, Judge, the way you should
 11:28:24 7 look at the representative claim here -- and just for what
 11:28:27 8 it's worth, I've been using the '237 patent just as kind of
 11:28:30 9 like, I guess, a guide.

11:28:32 10 MR. DESAI: Yes.

11:28:33 11 THE COURT: I've been using Claim 18, at least
 11:28:35 12 if I was using one claim, but I know there's a correlation.
 11:28:38 13 I think what your side is saying is, Judge, really, these
 11:28:42 14 representative claims, it's as if they said filter data.
 11:28:48 15 Then analyze some additional data. Then have a human
 11:28:53 16 analyze data. And, you know, that sounds a lot like, you
 11:28:56 17 know, ineligible claims, very functional-sounding kind of
 11:29:00 18 claims that the Fed Circuit has disclaimed the claims.

11:29:05 19 But the other side, of course, was saying, Well,
 11:29:07 20 there's a greater particularity here that matters. And
 11:29:12 21 there certainly are a lot of additional words in the claims,
 11:29:15 22 right, some of which we'll talk about. I know the
 11:29:19 23 Plaintiff, I think, will say might make a difference here.

11:29:22 24 But why, I guess, would you say it's fair to
 11:29:26 25 look at the claims in that very kind of basic way as opposed

11:29:29 1 to what the Plaintiff might say is, Well, look at the
 11:29:32 2 particular way in which we're doing some of those things?
 11:29:35 3 MR. DESAI: Right. So, we have the claim right
 11:29:36 4 up here. We can start with Claim 1 or Claim 18, I don't
 11:29:39 5 think it really matters for these functional steps.

11:29:42 6 I mean, collecting status data from a component
 11:29:44 7 of the network, right. I don't think there's anything more
 11:29:47 8 there than just collecting data. Status data is extremely
 11:29:51 9 broad. It's not any particular type of data.

11:29:54 10 And then you're analyzing the status data to
 11:29:57 11 identify a security-related event. Look at the data and
 11:30:00 12 see: Is it benign or is it a threat? Doesn't tell you how
 11:30:03 13 to do it.

11:30:04 14 And then it says the analysis includes
 11:30:06 15 filtering. Filtering is a well-known, routine activity.

11:30:14 16 And then when you're done with the filtering,
 11:30:17 17 there's stuff that may not be good and may not be bad
 11:30:20 18 because the computer doesn't know what to do with it. And
 11:30:22 19 the solution that the patent proposes, the distinguishing
 11:30:27 20 feature is go to the human, right. And so, we're invoking a
 11:30:32 21 human.

11:30:32 22 THE COURT: Well, before we get to the human,
 11:30:35 23 you know, there is this kind of two-stage kind of
 11:30:41 24 filtering/analysis process that happens at the probe level.
 11:30:44 25 There's the initial filter. But then there's the read or

11:30:49 1 the second stage of analysis that -- the taking this residue
 11:30:53 2 data it's called, we're going to have the probe analyze that
 11:30:57 3 a second -- anew or take this data and analyze it in a
 11:31:02 4 different way.

11:31:03 5 Now, I know you can say, Hey, that's just
 11:31:07 6 analyzed data plus filter data. But if there is some
 11:31:12 7 evidence, and I'll ask the Plaintiff this, I don't think
 11:31:17 8 there's a ton of discussion about this analysis
 11:31:20 9 post-filtering data in the patent. But if there's some
 11:31:22 10 evidence in the record that might suggest that computers
 11:31:25 11 really weren't, in terms of computers working on network
 11:31:29 12 security issues, weren't really at the time filtering and
 11:31:32 13 then going back and doing a second-level analysis on residue
 11:31:35 14 data, that was different and new. Computers weren't working
 11:31:39 15 that way.

11:31:40 16 Could that be enough to potentially save the
 11:31:43 17 claim here maybe in step two?

11:31:44 18 MR. DESAI: I think -- see, I think what's
 11:31:46 19 fundamental about this probe in the claim and how it was
 11:31:51 20 described by the Plaintiff itself is that the probe here is
 11:31:59 21 narrowing the information that the user will have to review.
 11:32:05 22 Okay. And it's doing it using well-known filtering and data
 11:32:13 23 discrimination analysis techniques.

11:32:14 24 And the key here is you can see at the bottom of
 11:32:20 25 this Slide 5 of the '237 patent, Column 3, Lines 4 to 19,

11:32:29 1 the purpose of this is to reduce the volume of data that the
 11:32:31 2 human has to review. Okay. And we have the *Electric Power*
 11:32:39 3 *Systems* case that tells us -- *Electric Power Group*, merely
 11:32:43 4 requiring the selection of manipulation of information to
 11:32:45 5 provide a humanly comprehensible amount of information
 11:32:48 6 useful for users by itself does not transform an otherwise
 11:32:53 7 abstract process.

11:32:54 8 And all they're doing with this probe is using
 11:32:58 9 well-known analysis to reduce the amount of information for
 11:33:03 10 the human to review. And let's be clear, the probe is
 11:33:07 11 simply a generic computing device that is automating
 11:33:11 12 analysis that a human could otherwise perform.

11:33:14 13 And here's why. BT cannot reasonably dispute
 11:33:18 14 that a human can analyze status data to identify a
 11:33:22 15 security-related vendor. Okay. That's the essence of the
 11:33:26 16 patent, having a human analyze the status data and figuring
 11:33:30 17 out benign or a threat.

11:33:32 18 And at Page 11 of their opposition, BT admits
 11:33:38 19 that a human can analyze the status data to determine good
 11:33:42 20 or bad. So, they said, "The analyst or analyst systems at
 11:33:46 21 the SOC are well equipped to determine whether residual
 11:33:50 22 status data is benign or constitutes a threat."

11:33:53 23 THE COURT: But I want to focus, again, though,
 11:33:55 24 on my question which is really about this concept of a
 11:33:58 25 filtering process that doesn't just do a good or bad. It

11:34:01 1 does a good or a bad, and it has this kind of middle ground
11:34:04 2 of data that it collects, and then having the probe do an
11:34:07 3 additional level of analysis on that residual data.
11:34:12 4 Now, I think it's the case that other than that
11:34:15 5 part of Column 8 that you've cited here, I don't think that
11:34:17 6 really talks about, otherwise, this additional step of
11:34:21 7 taking a hard look at the post-residue data.

11:34:24 8 Do you agree?

11:34:26 9 MR. DESAI: Well, I think this is right above
11:34:27 10 the highlighted portion.

11:34:28 11 THE COURT: Right. This is part of Column 8.

11:34:31 12 MR. DESAI: This is it.

11:34:32 13 THE COURT: It's not like it talks about it
11:34:34 14 here, and it talks about it in the abstract, and it talks
11:34:34 15 about it in the background section. This is it. This is
11:34:37 16 it.

11:34:37 17 But it's not like it -- but I understand this
11:34:39 18 part of the patent that you've got highlighted to be saying,
11:34:42 19 Look, when we're talking about analysis on residue data, the
11:34:46 20 type of analysis we're doing is a type of data
11:34:50 21 discrimination analysis, a type of analysis that computers
11:34:53 22 do.

11:34:54 23 I don't understand it to be saying that
11:34:56 24 computers were doing this combination of steps, filtering
11:35:00 25 for good and bad, and then analyzing post-residue data after

11:36:32 1 data.
11:36:32 2 THE COURT: Well, we know sometimes the cases
11:36:34 3 turn on whether there's enough of a record telling us that
11:36:36 4 the combination of known steps was, in fact, asserted to be
11:36:43 5 unconventional. Sometimes it seems like even when you have
11:36:46 6 a multi-step claim in a patent that seems like it is
11:36:50 7 basically doing very -- you know, kind of basic-sounding
11:36:54 8 computer-like steps, if the patent or the record tells us
11:36:58 9 enough to say, Hey, that was interesting, and new and
11:37:00 10 different from the way computers were working, sometimes it
11:37:03 11 can be saved.

11:37:04 12 And, I guess, as a lead-in to the other side,
11:37:06 13 they'll say, Look, the best case to analogize this case to
11:37:09 14 is *SR*. And if you look at *SR*, I mean, that claim, the way
11:37:13 15 those monitors were being used, I don't think anyone was
11:37:15 16 asserting that what the monitors were doing at any of those
11:37:18 17 steps was an unusual or different way that computer monitors
11:37:23 18 had been used or worked. It seemed like the Federal Circuit
11:37:25 19 there was just saying, But the combination was said to be
11:37:28 20 unconventional, and the patent said that, and that was
11:37:31 21 enough.

11:37:32 22 So, I guess it's a lead-up to say: How do you
11:37:34 23 distinguish this case from *SR*?

11:37:36 24 MR. DESAI: And before I get to *SR* in one
11:37:38 25 moment --

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11:35:05 1 that regularly at the time.

11:35:08 2 Does that seem correct?

11:35:09 3 MR. DESAI: Well, I think the principle of the
11:35:13 4 background of the patent tells us that probes were analyzing
11:35:17 5 data to identify good or bad, right. And the point being
11:35:21 6 here is the probe doesn't do anything special in a
11:35:26 7 technological way with this other data other than the claim
11:35:30 8 saying the abstract idea of analyzing it further and then
11:35:34 9 send it to the human.

11:35:35 10 THE COURT: But I guess my question is: How
11:35:37 11 come a filtering process plus an additional level of
11:35:42 12 analysis of a subset of that, you know, either filtered or
11:35:49 13 non-filtered data, whatever you want to call it, how come
11:35:51 14 that can't be the unconventional use of computer technology?
11:35:54 15 Let's put those two known steps together in a way that
11:35:57 16 computers weren't doing at the time.

11:35:59 17 MR. DESAI: I think, Your Honor, the problem
11:36:00 18 there is you have filtering and analysis of data, okay,
11:36:03 19 which are both abstract ideas. Okay. We cannot -- there's,
11:36:09 20 you know, a plethora of Federal Circuit cases that will say
11:36:11 21 that filtering and analysis of data are abstract ideas.

11:36:16 22 Now, the question is: That's what this claim is
11:36:20 23 directed to. Is there something more in the claim that
11:36:23 24 claims beyond those abstract ideas of using a computer as a
11:36:27 25 tool to do these abstract concepts of filter and analyze

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11:37:38 1 THE COURT: Sure.

11:37:38 2 MR. DESAI: -- I think we have to look at the
11:37:40 3 specification and what it describes as the improvement.
11:37:44 4 Okay. And you will not see here that it's -- the
11:37:47 5 improvement is the probe collecting and analyzing the data.
11:37:53 6 The improvement is categorically the human that's being
11:37:57 7 supplemented.

11:37:58 8 THE COURT: I grant you that the patent is, from
11:38:01 9 the Plaintiff's perspective, not great in the sense that it
11:38:04 10 focuses a lot on human analog, doing human analysis that
11:38:08 11 seems like it's saying computers can do, too, though may be
11:38:12 12 doing it at a seminal point in time or doing it in a more
11:38:15 13 efficient way.

11:38:15 14 What I'm leading, though, at asking about the
11:38:18 15 post-residue data and that piece and what it adds is there
11:38:21 16 is cited in the patent this Notice of Allowability from the
11:38:25 17 examiner. And in the Notice of Allowability, it does seem
11:38:27 18 to say, at least in the examiner's view, that while
11:38:29 19 filtering, positive and negative filtering via computer
11:38:32 20 probes was done, that the piece of adding the second step of
11:38:35 21 analyzing post-residue data was new, and different, and
11:38:38 22 unusual and significant enough to the examiner that it
11:38:41 23 seemed like it made a difference in terms of at least the
11:38:44 24 patentability step. I don't know whether at 101, or 102, or
11:38:48 25 103.

11:38:48 1 But what about that? Isn't that telling me what
 11:38:50 2 the patent doesn't quite tell me about this post residue --
 11:38:53 3 MR. DESAI: Right. So, that's -- I think the
 11:38:55 4 file history issue is simply the examiner saying, This was
 11:38:57 5 missing in the particular prior art that was before the
 11:39:00 6 examiner. I do not believe you can take that Notice of
 11:39:05 7 Allowability and say -- reach the conclusion, Well, this is
 11:39:08 8 the invention, the improvement.

11:39:11 9 There's, obviously -- you know, we do a lot of
 11:39:14 10 work in IPRs, and there's a distinction between pointing out
 11:39:17 11 what's missing in a particular piece of prior art versus how
 11:39:20 12 the patentee itself in the specification describes the
 11:39:24 13 improvement. And here, it's replete that the -- it's the
 11:39:28 14 security analysis.

11:39:29 15 Now, but let me turn to SRI because I think
 11:39:32 16 that's a good cite --

11:39:32 17 THE COURT: Before you get into that, one last
 11:39:34 18 question about that, because I think what you're getting
 11:39:35 19 into is like a common problem with regard to 101 motions at
 11:39:38 20 the Rule 12 stage. We don't have a great record. Right.
 11:39:41 21 And it's like who to blame or who to benefit for the fact
 11:39:44 22 that we don't have a great record, that we have maybe
 11:39:46 23 sometimes these tiny pieces that if looked at one way, well,
 11:39:51 24 could it support a fact question at step two about whether
 11:39:54 25 "X" is the unconventional use of computer technology?

11:39:56 1 Maybe. Or maybe looked in a different way, no, it's not
 11:39:59 2 clear what it said.
 11:40:00 3 You know, the patent is not great about this,
 11:40:01 4 and it's kind of like: Who do you ding for the fact that we
 11:40:06 5 might not have a better record about that or who do you give
 11:40:09 6 the benefit of the doubt to?

11:40:10 7 Is there anything you want to say about that?
 11:40:12 8 MR. DESAI: I will say in this case the record
 11:40:15 9 shouldn't matter for this reason. The claim is -- it's a
 11:40:20 10 bare claim of analyzed leftover or unknown data. That's it.
 11:40:27 11 It does not tell you in any way, shape or form how you're
 11:40:31 12 going to identify a security-related event from that data.
 11:40:35 13 It is -- that is the type of abstract claiming analyzing
 11:40:40 14 data using a computer as a tool to do exactly what a human
 11:40:44 15 can do without adding more.

11:40:46 16 THE COURT: So, this is a great jumping off
 11:40:48 17 point to SRI. How did SRI -- was anything different that
 11:40:51 18 was happening?

11:40:51 19 MR. DESAI: There is a major difference between
 11:40:53 20 this case and SRI. And they made it very clear that BT is
 11:40:57 21 hanging their hat on SRI. There's no debating that.

11:41:00 22 But it is a superficial argument based on the
 11:41:04 23 fact that the general subject matter is related to network
 11:41:07 24 security. And the most important facts here that BT
 11:41:10 25 overlooks is that there is nothing in the SRI spec, the

11:41:14 1 claims or the Federal Circuit opinion, that the improvement
 11:41:17 2 involved a human solution.
 11:41:19 3 That is a major distinction, and that's clear
 11:41:22 4 what we have here for the '237 and '641 patents. And if you
 11:41:26 5 look at --

11:41:27 6 THE COURT: And I grant you that and I
 11:41:28 7 understand that. You know, we've got a human who's playing
 11:41:31 8 a role here, and maybe the patent says a significant role in
 11:41:33 9 the invention. But even if one looked at this invention
 11:41:36 10 simply by looking at the computerized probe and the work
 11:41:40 11 it's doing, how would you differentiate the work that the
 11:41:42 12 computerized probes are doing in this invention from the
 11:41:44 13 work that the monitors were doing in SRI.

11:41:47 14 MR. DESAI: So, I think just before I answer
 11:41:49 15 that question --

11:41:49 16 THE COURT: Sure.

11:41:50 17 MR. DESAI: -- I'd just like to point out there
 11:41:52 18 is a significant contradiction in BT's briefing that makes
 11:41:56 19 the distinction between SRI and BT's patents clear. At
 11:42:00 20 Page 11 of their brief, as we already pointed out, it's very
 11:42:04 21 clear that the human can perform the analysis of the claim
 11:42:08 22 status data to determine good or bad. That's essential for
 11:42:11 23 their patent, right, that the human can do this analysis,
 11:42:15 24 the security analysis, right, the security analyst.

11:42:19 25 And it says -- I already read you the quote on

11:42:21 1 Page 11 of their brief. Three pages later on Page 14 of the
 11:42:25 2 brief, BT tries to align itself with SRI, and they quote
 11:42:29 3 this aspect of the Federal Circuit. They said, "But the
 11:42:31 4 Federal Circuit has held that the human mind is not equipped
 11:42:36 5 to detect suspicious activity in computer networks."
 11:42:39 6 That's the finding in SRI. Okay. And that is a
 11:42:45 7 clear contradiction. On the one hand, they're saying for
 11:42:48 8 their own patent, the human can handle -- is well equipped
 11:42:54 9 to detect benign or a threat. But in SRI, a human cannot.
 11:43:03 10 The only way to resolve this contradiction is
 11:43:07 11 that the BT patent, as it says on its face over and over and
 11:43:10 12 over again, is about -- directed to the human determining
 11:43:16 13 from status data whether data is good or bad, and then
 11:43:19 14 updating the probes. The human telling the probe, This is
 11:43:21 15 what you should do with that data.

11:43:22 16 Okay. And in SRI, the record showed, based on
 11:43:26 17 the quote that BT included in its own brief, that a human
 11:43:30 18 could not do the specific analysis of the specific data
 11:43:34 19 claimed to automatically detect a large-scale attack. That
 11:43:38 20 was a significant part of the SRI finding, that a human
 11:43:42 21 could not do the analysis. And that is the exact opposite
 11:43:48 22 of what we have in this case.

11:43:49 23 BT and SRI are not the same. BT's patents are
 11:43:55 24 directed to a human solution. SRI was about a technical
 11:43:58 25 solution.

11:43:58 1 THE COURT: Okay. Mr. Desai, I want to let you
 11:44:01 2 save a few minutes for rebuttal. Is there anything you wish
 11:44:04 3 to add before you do that?

11:44:05 4 MR. DESAI: Your Honor, I think I covered the
 11:44:07 5 major point about SRI. I just -- I would like to say there
 11:44:10 6 is a bit of an issue with respect to the housekeeping on
 11:44:14 7 what's claims and what's representative.

11:44:17 8 In our motion, we had said Claim 18 of the '237
 11:44:20 9 was representative. It was not disputed in BT's opposition.
 11:44:26 10 Okay.

11:44:26 11 There is a slide in their slide deck, I don't
 11:44:29 12 know if they're going to cover it, where there is now an
 11:44:32 13 argument that Claims 1, and 10 and 14 for the '641 are
 11:44:35 14 representative. Claims 18, 23 and 25 are representative of
 11:44:39 15 the '237. That's not in their opposition brief.

11:44:41 16 THE COURT: Right. The one that we didn't
 11:44:43 17 discuss that I think was probably fairly raised in the
 11:44:45 18 Plaintiff's brief is they're citing at Claim 14 and its use
 11:44:49 19 across probe correlation. We can talk about that, to the
 11:44:53 20 extent you had planned to talk about that on rebuttal.

11:44:56 21 MR. DESAI: Yeah.

11:44:57 22 THE COURT: I think that concept is probably
 11:44:59 23 fairly raised as an alleged additional distinguisher. So,
 11:45:02 24 we can talk about that on rebuttal. Okay?

11:45:05 25 MR. DESAI: Sure.

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11:45:05 1 THE COURT: Okay. Thank you.
 11:45:13 2 MR. GOLDBERG: Your Honor, if I can hand up some
 11:45:15 3 printouts?
 11:45:16 4 THE COURT: You may. Thank you.
 11:45:17 5 MR. GOLDBERG: Thank you so much.
 11:45:24 6 THE COURT: Mr. Goldberg.
 11:45:25 7 MR. GOLDBERG: Your Honor, at step one, you look
 11:45:27 8 at what the claim is directed to, its character as a whole.
 11:45:32 9 You don't selectively highlight certain keywords emphasizing
 11:45:36 10 some parts of the spec, but not other parts of the spec.
 11:45:39 11 So, I want to go through this a little bit more
 11:45:43 12 rigorously starting with what the patent says the problem
 11:45:46 13 was the inventors were trying to solve. And really the key
 11:45:49 14 here is that in the prior art, the security devices, like
 11:45:53 15 firewalls, they were inadequate to detect and respond to
 11:45:57 16 threats that weren't yet known.
 11:45:59 17 So, they could use filter-based signature
 11:46:01 18 matching, for example, to find a known virus. But if a
 11:46:05 19 virus didn't yet have a signature, which is sort of like a
 11:46:08 20 pattern, it would pass through the device, and it would harm
 11:46:11 21 the network.
 11:46:12 22 MR. GOLDBERG: Now, these devices were managed
 11:46:14 23 locally by local system administrators. And what the patent
 11:46:17 24 explains, these administrators were ill equipped to identify
 11:46:21 25 these new threats. In part, because they didn't have the

11:46:24 1 tools, and experience and the intelligence, meaning
 11:46:28 2 information, that they would need to identify these threats.
 11:46:31 3 And the way these devices worked is they would,
 11:46:35 4 you know, block the known data viruses, allow the known into
 11:46:38 5 traffic, and the rest would just get logged. So, you know,
 11:46:40 6 a big pile of what they describe as audit information, sort
 11:46:43 7 of all this unknown traffic. And there's really no
 11:46:45 8 effective way of mining that adequately enough.
 11:46:49 9 Now, and these devices, because they were
 11:46:51 10 managed locally, had very limited visibility. So, you
 11:46:56 11 couldn't see what was going on in other networks or other
 11:46:58 12 parts of the network they were tied to.
 11:47:00 13 Now, the first point I'd like to make here, and
 11:47:02 14 I'll discuss this, you know, in some detail as we get deeper
 11:47:05 15 in the presentation, but the patent discloses using local
 11:47:09 16 system administrators as part of the prior art. As, you
 11:47:13 17 know, they first indicated, the invention has to be more
 11:47:16 18 about just incorporating a human, because incorporating a
 11:47:18 19 human, the local administrator was already in the record.
 11:47:21 20 It's described in the spec, and the patent disparages that
 11:47:24 21 solution as ineffective.
 11:47:26 22 THE COURT: Only because the system
 11:47:28 23 administrator didn't have the time. The system --
 11:47:31 24 presumably if the system administrator had the time to do
 11:47:34 25 what the human at the SOC could do, they could have done it.

11:48:51 1 first start with regard to the '641, Claim 1. It's an
 11:48:54 2 analyst system, not an analyst. But even here, right, it's
 11:48:57 3 the point of the analyst being at the SOC. And the patent
 11:49:01 4 describes the analyst in a very specific way as somebody who
 11:49:06 5 specializes in identifying these types of threats and has
 11:49:10 6 access to tools.

11:49:11 7 So, I refer Your Honor, it's Column 2, it's
 11:49:14 8 Line 35. And so, you know, the invention, in part, is more
 11:49:19 9 than the analyst. It's how you get the information to the
 11:49:22 10 analyst. It's what information is sent to the analyst in
 11:49:26 11 particular, what you're asking them to do, and then the
 11:49:29 12 feedback step that follows the analyst.

11:49:32 13 So, each of these steps, and not just the
 11:49:34 14 analyst itself as to the benefit to the invention, increases
 11:49:39 15 the functionality of the invention.

11:49:40 16 THE COURT: Let me ask you this, though. I'm
 11:49:42 17 not saying they are, but if the claims had four limitations
 11:49:46 18 or representative claims, four limitations. And the first,
 11:49:50 19 literally all that the claim said for limitation one was
 11:49:52 20 filter data.

11:49:54 21 And then limitation two, all that it said was
 11:49:58 22 analyze data.

11:50:00 23 And then at step three, it said send data to
 11:50:04 24 human for analysis.

11:50:07 25 And at step four, it was human provide feedback

11:51:15 1 Our invention does. And what the patent
 11:51:17 2 describes is you start -- and if I can refer Your Honor to
 11:51:20 3 Figure 1. If you look at the prior art, Your Honor, as
 11:51:24 4 described in the patent, it's just the firewall, for
 11:51:26 5 example, element 1010 protecting a customer network.
 11:51:29 6 And what we've done here is added an entire
 11:51:33 7 second network here. It's a security-focused network that
 11:51:37 8 exists including the probe, and the probe does the first
 11:51:40 9 part of the residue analysis. So, that's, you know, as you
 11:51:44 10 had correctly said, the Notice of Allowance, which has to be
 11:51:47 11 taken as true in this context. The analysis of the residue
 11:51:51 12 was the patentable distinction.

11:51:52 13 That occurs in two places, right. The first
 11:51:54 14 part is the probe. And then we have communication to the
 11:51:57 15 secure operation center where we have in the '641, the
 11:52:01 16 analyst system, or the analyst in '237, Claim 18.

11:52:05 17 And so, you know, when they referred earlier --
 11:52:07 18 THE COURT: Can I just ask as a factual matter:
 11:52:09 19 Is the assertion that what the data that the analyst is
 11:52:12 20 looking at at the SOC or the S-O-C, is the data they're
 11:52:15 21 looking at the residual data that the probe has already
 11:52:19 22 analyzed?

11:52:19 23 MR. GOLDBERG: So, the Plaintiff's point, Your
 11:52:21 24 Honor, is there's two statements of analysis or processing
 11:52:24 25 at the probe. First, you're going to filter status data,

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11:50:10 1 on data.
 11:50:11 2 If that's literally all that was in the claim,
 11:50:13 3 would that kind of a claim pass muster under Section 101?
 11:50:17 4 And if not, exactly what's different about what's claimed
 11:50:20 5 here in these patents?

11:50:22 6 MR. GOLDBERG: So, Your Honor, your analogy
 11:50:24 7 would apply to a situation where you had an Excel
 11:50:27 8 spreadsheet running on a computer, and you decided at
 11:50:30 9 step one you're going to filter all entries under the letter
 11:50:33 10 B. And then at step two, you're going to sort it. And then
 11:50:36 11 you're going to pass it to a human to say, Hey, does this
 11:50:39 12 look good to you? Okay. I'm going to display it. That's
 11:50:41 13 straight using the computer as a tool.

11:50:43 14 In our case, there are a series of steps that
 11:50:45 15 occur in defined locations in defined sequence for the
 11:50:49 16 purpose of improving the underlying system itself. The
 11:50:52 17 security device is enabled to do things it couldn't
 11:50:55 18 otherwise do.

11:50:56 19 And so, you know, I get the example, and in
 11:50:59 20 certain circumstances, like the Excel spreadsheet, that's
 11:51:03 21 the quintessential, you know, taking a human process. You
 11:51:05 22 know, we all sort of manipulate data in that way and put it
 11:51:08 23 on a computer to make it go better, faster and easier. It
 11:51:10 24 doesn't disrupt how the computer operates. It doesn't
 11:51:13 25 enable new functionality.

11:52:28 1 and you're doing positive and negative filtering of status
 11:52:31 2 data.

11:52:31 3 That's not the traffic itself. It's information
 11:52:34 4 that's either generated from or relates to traffic. And
 11:52:37 5 you're selecting or discarding certain status information.

11:52:41 6 And then you have the residual status
 11:52:43 7 information, okay, and that's what the Notice of Allowance
 11:52:47 8 is all about.

11:52:47 9 Now, if you look at it from a preemption point
 11:52:49 10 of view, you --

11:52:50 11 THE COURT: I want to get back to my question.
 11:52:52 12 I understand you have data that's being filtered. And some
 11:52:55 13 data is being filtered out as being fine, and some data is
 11:52:58 14 being highlighted or filtered out as being problematic, and
 11:53:02 15 some data is just being allowed. Not an issue, it's fine.

11:53:05 16 And then there is some categorization of
 11:53:07 17 residual data --

11:53:08 18 MR. GOLDBERG: Yes.

11:53:09 19 THE COURT: -- that the probe then engages in
 11:53:11 20 some additional analysis of.

11:53:12 21 MR. GOLDBERG: Yes, Your Honor.

11:53:13 22 THE COURT: Then there's a second later step in
 11:53:15 23 which some type of data is sent to the human at the SOC.
 11:53:17 24 What data is being sent? Is it just that residual data that
 11:53:21 25 has been analyzed by the probe or is it additional data

11:53:23 1 beyond --
 11:53:23 2 MR. GOLDBERG: It's a subset of that, Your
 11:53:25 3 Honor. So, you have the residue. You identify possible
 11:53:28 4 security events at the probe. And then you send the
 11:53:31 5 information link of possible events up to the analyst or
 11:53:34 6 analyst system in the SOC.

11:53:36 7 Now, in the dependent claims, you'll have a
 11:53:38 8 level of computerized analysis which could include
 11:53:42 9 cross-correlation. So, it's either two or three independent
 11:53:44 10 claims.

11:53:46 11 The residue is basically broken up and analyzed
 11:53:48 12 two or three times, Your Honor. And that's really what I
 11:53:50 13 would argue is the crux of the invention.

11:53:52 14 THE COURT: Are the said identified events that
 11:53:53 15 are sent off to the human in the SOC, are they events that
 11:53:57 16 relate to data that was in the residual data or are they
 11:54:03 17 events that relate to data that was in the residual data and
 11:54:03 18 in some other kind of data that was in the probe that was
 11:54:05 19 assessed?

11:54:06 20 MR. GOLDBERG: As described by the claims, Your
 11:54:07 21 Honor, it's a subset of residue data that's been selected
 11:54:10 22 through the first level of analysis as being potentially a
 11:54:14 23 problem.

11:54:14 24 THE COURT: You mentioned the Notice of
 11:54:17 25 Allowance and Paragraph 6, I think, is the part of it where

11:54:18 1 it talks about at least what was seen as the patentable
 11:54:21 2 distinction by the examiner. Again, you know, I think in
 11:54:26 3 reading that paragraph, I think the thing the examiner is
 11:54:29 4 focusing on, I think what the examiner is basically saying
 11:54:32 5 is: Did prior art computer systems do positive and negative
 11:54:36 6 filtering to look for problematic data from a network
 11:54:40 7 security perspective? Yes.

11:54:41 8 But what they didn't do, those probes or
 11:54:43 9 computers, what they didn't do is they didn't then reassess
 11:54:47 10 some middle ground of data that was identified as either a
 11:54:50 11 positive or negative like this patent does. And so, in
 11:54:55 12 light of that, we're going to allow these claims.

11:54:59 13 That second stage of post-residue data analysis
 11:55:03 14 added on to the positive or negative filtering stage is
 11:55:07 15 what's being described in Paragraph 6.

11:55:08 16 Is that correct?

11:55:09 17 MR. GOLDBERG: I would clarify that in two ways,
 11:55:13 18 Your Honor. First, signature matching is a form of positive
 11:55:15 19 or negative filtering that's not what's claimed here. It's
 11:55:18 20 filtering of status data. So, I'm not sure he's necessarily
 11:55:21 21 conceding that filtering status data positively and
 11:55:23 22 negatively is what's known in the art, although I do think
 11:55:26 23 it was. But I don't think that's what he's talking about
 11:55:29 24 here.

11:55:29 25 What he's talking about is residue data. It's

11:55:31 1 what they describe as the millions of lines of audit
 11:55:34 2 information of unknown data that's just logged and never
 11:55:37 3 looked at. And the way -- what the invention does is looks
 11:55:40 4 at it multiple times in multiple places. So, that's what
 11:55:43 5 he's referring to here about the residue, Your Honor.

11:55:45 6 THE COURT: But to my larger point, is what the
 11:55:47 7 examiner basically is saying is the thing that is key, the
 11:55:50 8 thing that is important about why I'm going to say this
 11:55:53 9 patent is going to get granted is it's not just positive or
 11:55:57 10 negative filtering, it's positive and negative filtering
 11:56:00 11 plus additional analysis of post-residue data?

11:56:03 12 MR. GOLDBERG: That's correct, Your Honor.
 11:56:04 13 THE COURT: Okay. Now, in your Complaint when
 11:56:05 14 you cite to this, I don't know, the paragraph in which you
 11:56:07 15 cite to it, it seems like it's focused more on the
 11:56:10 16 additional concept which is captured in some of the
 11:56:13 17 dependent claims, a cross-probe analysis. The idea that I
 11:56:16 18 think prior art systems, and I forget how you say it in the
 11:56:19 19 claim, weren't utilizing data from different points in the
 11:56:22 20 network.

11:56:22 21 MR. GOLDBERG: Mm-hmm.
 11:56:23 22 THE COURT: Is the whole cross-probe analysis
 11:56:27 23 piece being talked about by the examiner, or is that some
 11:56:30 24 additional piece of unconventional use that you're adding
 11:56:34 25 when you talk about it?

11:56:35 1 MR. GOLDBERG: It's an additional piece, Your
 11:56:37 2 Honor. So, additional, but related might be a better way of
 11:56:40 3 describing it. So, what the patent does, it solves multiple
 11:56:42 4 problems. One of which is finding unknown threats.
 11:56:46 5 And the other piece is allowing the locally
 11:56:48 6 managed device to benefit from things going on in other
 11:56:51 7 networks. And that's part of why we introduce this
 11:56:55 8 hierarchical level, much as like they did in *SRP*.

11:56:57 9 With cross-probe correlation, what the dependent
 11:56:59 10 claims add is you'll have your positive and negative
 11:57:01 11 filtering of status data. You'll have a first analysis at
 11:57:04 12 the probe that can find the possible security events.
 11:57:07 13 You'll send that over the line to the SOC.

11:57:09 14 The SOC will now do additional computerized
 11:57:12 15 analysis of the residue using what it's learned from other
 11:57:15 16 locations. So, while it's unknown to you, it might be known
 11:57:18 17 to your competitor. And so, you can now benefit from that.
 11:57:22 18 And then an even smaller refined subset goes to the analyst,
 11:57:26 19 so it's a third layer of analysis of the residue --

11:57:30 20 THE COURT: So, the cross-probe correlation
 11:57:33 21 discussed in Claim 14, that happens electronically, and it
 11:57:35 22 happens at the SOC?

11:57:36 23 MR. GOLDBERG: That's correct, Your Honor.
 11:57:36 24 THE COURT: It's not an example. I know Claim
 11:57:39 25 14 requires that it be computer based.

11:57:39 1 MR. GOLDBERG: Yeah.
 11:57:41 2 THE COURT: I wasn't sure I understood it
 11:57:43 3 happened at the SOC as opposed to earlier in the probe.
 11:57:45 4 MR. GOLDBERG: And, you know, my notes are tied
 11:57:47 5 to the '641, unfortunately, but the '641, Claim 14 depends
 11:57:51 6 on Claim 10. And Claim 10 makes clear it's a computerized
 11:57:54 7 analysis.
 11:57:54 8 THE COURT: Yeah, Claim '237, similar, although
 11:57:57 9 actually in Claim 14 there, it says computer based.
 11:57:59 10 MR. GOLDBERG: Yes.
 11:57:59 11 THE COURT: So, I guess a related question:
 11:58:03 12 You're talking about the steps of the *Alice* analysis. What
 11:58:06 13 are these claims directed to?
 11:58:07 14 I think probably fairly in your brief, there's
 11:58:11 15 probably three pieces that you highlight as being -- no, I'm
 11:58:16 16 sorry -- maybe four, depending on how you look at it, that
 11:58:19 17 you highlight as being important to the claimed solution
 11:58:22 18 depending on whether we're talking about independent or
 11:58:24 19 dependent claims.
 11:58:25 20 I think you highlight the fact that the claims
 11:58:27 21 utilize the positive and negative filtering aspects that the
 11:58:31 22 probe does. I think you highlight that the claims utilize
 11:58:35 23 an additional analysis of residue data that is either
 11:58:39 24 identified as a positive or negative by the filter. You
 11:58:42 25 identify certainly and talk about how the claims require the

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11:58:45 1 use of the human analyst as to that residue data.
 11:58:50 2 And then you talk about how, fourth, in certain
 11:58:53 3 dependent claims, the concept of cross-probe correlation,
 11:58:56 4 which I think I understand to mean, we're not just going to
 11:58:59 5 be necessarily getting data from one probe, but from
 11:59:01 6 multiple probes, which might be helpful if multiple probes
 11:59:04 7 are seeing the same problem.
 11:59:05 8 And those four components, I think, are all
 11:59:07 9 things you talk about and highlight. I guess for a step one
 11:59:11 10 perspective, what are these claims directed to? What's the
 11:59:14 11 focus of the patent? It seemed to me that in looking at the
 11:59:17 12 patent and the early columns in it, not a lot of discussion
 11:59:22 13 of that analysis, of post filtering. Ironically, the thing
 11:59:25 14 the examiner said is the key to allowance, it's not a
 11:59:29 15 discussion about cross-probe correlation.
 11:59:31 16 Really most of the focus seems to be on, I
 11:59:33 17 think, what you call in your briefing this two-level
 11:59:36 18 analysis. We do some filtering at the probe. We do some
 11:59:40 19 analysis by humans at the SOC.
 11:59:41 20 Is that fair?
 11:59:42 21 MR. GOLDBERG: I don't think so, Your Honor. I
 11:59:44 22 think, first of all, I wouldn't describe it as two-level
 11:59:47 23 analysis. I would describe it as a two-level architecture.
 11:59:50 24 And, you know, going back to Figure 1 here, originally you
 11:59:58 25 just didn't have any of the -- even the locations in which

12:00:01 1 to do the multiple steps of analysis. All those were tied
 12:00:05 2 together.
 12:00:06 3 But the big piece, Your Honor, that wasn't on
 12:00:07 4 the list, and this may have been a function of just our
 12:00:10 5 drafting, but I do think we covered it is the feedback
 12:00:12 6 element. So, this is designed to improve the computer
 12:00:16 7 system over time. So, not only does the system detect
 12:00:19 8 unknown threats, but the feedback now allows for the filters
 12:00:23 9 to be updated over time so what's unknown can be treated as
 12:00:26 10 known going forward.
 12:00:27 11 So, it improves the device in multiple ways. I
 12:00:30 12 think the feedback step is very important because that's
 12:00:33 13 what takes all the analysis, whether it's one step of an
 12:00:36 14 analysis or two or three, and takes it back to the lower
 12:00:40 15 level to improve the operation of the prior art security
 12:00:43 16 system.
 12:00:43 17 So, I think the feedback element, Your Honor, is
 12:00:46 18 important. And so, that's what I meant when I said earlier,
 12:00:49 19 you know, what happens before the analyst is important. The
 12:00:51 20 analyst is important. And what happens after the analyst is
 12:00:53 21 equally important, and that's the feedback step.
 12:00:56 22 THE COURT: But would you acknowledge that in
 12:00:58 23 the claims and, again, I've been using Claim 18 as an
 12:01:02 24 example of the '237. If we look to see what does the claim
 12:01:06 25 really require of that human at the SOC --

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12:01:11 1 MR. GOLDBERG: Mm-hmm.
 12:01:11 2 THE COURT: -- and if the other side were to
 12:01:13 3 say, you know what, all it requires and all -- the only
 12:01:16 4 thing that can be said it actually requires is that the
 12:01:19 5 human analyze the data. That's it.
 12:01:24 6 MR. GOLDBERG: Mm-hmm.
 12:01:25 7 THE COURT: And then the human provide feedback
 12:01:28 8 on the data. There's no more specific narrowing of
 12:01:32 9 particularized requirements. Anything that amounts to
 12:01:36 10 analysis of data by the human and feedback on the data, that
 12:01:39 11 would count for purposes of the claims; is that correct?
 12:01:41 12 MR. GOLDBERG: I think -- so, Your Honor's
 12:01:44 13 focusing very tightly on that one limitation. What I would
 12:01:48 14 say, you take a step back --
 12:01:49 15 THE COURT: Just answer my question. I want to
 12:01:50 16 know what the limitation means, in your view, before we get
 12:01:52 17 to how maybe it's combined with other limitations or
 12:01:55 18 wherever you're going to go. Is it fair to say that that is
 12:01:58 19 all that it could mean, each of those limitations?
 12:02:00 20 MR. GOLDBERG: Well, and it's fair, Your Honor,
 12:02:03 21 but I think the only reason why that's possible in the first
 12:02:05 22 step are the steps that precede it. So, again, to turn to
 12:02:09 23 the prior art for a second just to draw the distinction
 12:02:11 24 here.
 12:02:12 25 Originally, you had a local system administrator

12:02:15 1 and they couldn't do the job. So, why couldn't they do the
 12:02:18 2 job? And it's volume, as Your Honor said, time and
 12:02:20 3 expertise.

12:02:20 4 So, you know, yes, what's happening -- we didn't
 12:02:24 5 invent a particular way for the analyst to work. No one
 12:02:27 6 claimed we did. We didn't invent a particular way of doing
 12:02:29 7 filtering in isolation or anything in isolation.

12:02:32 8 We have an architecture and we plug this all
 12:02:34 9 together. And as a result, the human, the analyst, can be
 12:02:38 10 involved meaningfully in the process and improve the machine
 12:02:41 11 in the way the prior art said they couldn't.

12:02:43 12 So, you know, yes, what they're doing within
 12:02:45 13 their space may not be inventive, but the fact that they're
 12:02:48 14 able to do it is a function of the architecture.

12:02:50 15 THE COURT: Just so, you know, I think the thing
 12:02:52 16 that I'm struggling with a bit is that I think Mr. Desai
 12:02:57 17 when he gets up is going to say, Judge, I think you can
 12:03:00 18 fairly read a claim like Claim 18 to be a claim that
 12:03:03 19 essentially says computer filters data. Computer analyzes
 12:03:10 20 some of that data.

12:03:11 21 MR. GOLDBERG: Mm-hmm.

12:03:12 22 THE COURT: Human analyzes that extra -- some of
 12:03:15 23 that data. Human provides feedback on data.

12:03:18 24 And he's going to say, If that's what it can
 12:03:20 25 fairly be read as, that one, two, three, four, that's like

12:04:37 1 computer, as a result of these steps, functions in exactly
 12:04:41 2 the same way it did before.

12:04:44 3 There's no disruption. There's no enablement or
 12:04:47 4 new functionality. We were just taking data from these
 12:04:50 5 various sites and moving them around, you know, more quickly
 12:04:53 6 then previously. You know, the computer system itself, you
 12:04:57 7 know, is not disrupted in any way. It's not expanded in any
 12:05:01 8 way. And here, given the risk of preempting essentially
 12:05:05 9 computerization of clinical trials.

12:05:07 10 So --

12:05:07 11 THE COURT: Nor here is the computer disputed or
 12:05:10 12 expanded -- the use of the computer is disrupted or
 12:05:13 13 expanded, to use your words, in a way that distinguishes
 12:05:15 14 what's going on to say what was happening *In Re: Rosenberg*.

12:05:19 15 MR. GOLDBERG: Yeah, Your Honor. So, in our
 12:05:20 16 case, a prior art system, as described in the spec, which
 12:05:23 17 was unable to be managed -- find new threats and was managed
 12:05:27 18 locally is now enabled to be managed remotely to identify
 12:05:31 19 new threats, unknown threats in real time in a way that
 12:05:33 20 works and balances all the constraints of a modern network.
 12:05:37 21 And the patent explains that in the prior art, all the prior
 12:05:39 22 art device did was either log, or, in the case of Notice of
 12:05:44 23 Allowance, discard this big pile of residue.

12:05:46 24 Well, that's what you would expect to happen in
 12:05:48 25 the ordinary course. We disrupted that by now you're going

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12:03:23 1 abstract idea, plus abstract idea, plus abstract idea, plus
 12:03:27 2 abstract idea. And, you know, they'll talk about -- you
 12:03:30 3 know, I think it is Greenberg that the other side cites?

12:03:34 4 MR. GOLDBERG: *Rosenberg*.

12:03:35 5 THE COURT: *Rosenberg*, sorry, that the other
 12:03:37 6 side cites as their most relevant case. Right. I think if
 12:03:39 7 you look at that claim, essentially if you look at it, what
 12:03:41 8 it kind of looks like is collected, transmitted, processed
 12:03:45 9 data, filtered it.

12:03:46 10 You know, they're saying that's what this is.

12:03:48 11 This is filter data, analyze some of that data, human
 12:03:51 12 analyze that same data, human provide feedback on that data.

12:03:55 13 I think what I need to hear from you is: Why is
 12:03:58 14 that not right? Why is this about something different than
 12:04:01 15 that? What would you say?

12:04:03 16 MR. GOLDBERG: Well, Your Honor, look, whether
 12:04:04 17 it's *Ankara* or *BASCOM*, you know, specific series of steps at
 12:04:10 18 specific locations for specific purposes is patentable
 12:04:13 19 subject matter. And to turn to maybe *In Re: Rosenberg*,
 12:04:16 20 which I think, you know, Your Honor mentioned as a good way
 12:04:19 21 of distinguishing this situation -- let me get to the claim
 12:04:24 22 here, Your Honor.

12:04:27 23 So, this is a perfect example when you have a
 12:04:30 24 process that a human used to perform, and we've computerized
 12:04:33 25 it for speed or efficiency. And here, you know, the

12:05:50 1 to take this residue, and you're going to analyze two or
 12:05:53 2 three times at different locations and defined hierarchy for
 12:05:57 3 different things. So, in that sense, it's very distinct

12:06:00 4 from *In Re: Rosenberg*, Your Honor.

12:06:01 5 And if I can focus just a little bit, Your
 12:06:04 6 Honor, on the *SR*/claim.

12:06:06 7 THE COURT: Yeah. I guess that's maybe the last
 12:06:07 8 piece we'll have, because you're close to the end of your
 12:06:09 9 time.

12:06:10 10 MR. GOLDBERG: Understood, Your Honor.

12:06:11 11 THE COURT: Tell me more about -- now,
 12:06:12 12 particularly, if you'll address -- I asked Mr. Desai to
 12:06:17 13 distinguish the claim. He talks about the fact that we have
 12:06:18 14 a human component here in our claim. And he talks about the
 12:06:21 15 *SR*/Court's conclusion with regard to the claim at issue
 12:06:25 16 there, that the human mind wasn't equipped to do the kind of
 12:06:29 17 work that the claimed monitors were doing.

12:06:32 18 MR. GOLDBERG: Mm-hmm. So, I think what

12:06:33 19 Mr. Desai is talking about is really the automatically
 12:06:36 20 receiving and integrating the report step of the '615 and
 12:06:39 21 talking about what happens at our SOC. And really I have
 12:06:43 22 four responses to that, Your Honor.

12:06:45 23 The first, again, I know we're focused on the
 12:06:47 24 '237 claim here, but in the '641, we don't have an analyst.

12:06:51 25 We have an analyst system. And I do believe we mentioned

12:06:53 1 that in our briefing, Your Honor.
 12:06:54 2 The dependent claims, including 14, have
 12:06:57 3 additional computerized analysis at the SOC. And so, I have
 12:07:01 4 a hard time seeing -- I have never seen any case law
 12:07:04 5 supporting that you can have computerized analysis of the
 12:07:07 6 SOC, but then, because you add a human step, that somehow
 12:07:10 7 negates everything else in the claims, Your Honor.
 12:07:13 8 So, even if you have to have automatically
 12:07:16 9 necessarily requires computerized, and I'm not sure it does,
 12:07:20 10 we have that in the dependent claims, Your Honor, it lines
 12:07:24 11 up perfectly. So, yes, we do. We have an extra step.
 12:07:27 12 Again, and I've never seen any case law that
 12:07:30 13 says -- putting aside the computerized step, I've never seen
 12:07:33 14 any case law that says, Your Honor, that you can't have a
 12:07:35 15 human in the process, if the idea here is the human helps
 12:07:39 16 improve the operation of the machine.
 12:07:41 17 It's the reverse of a typical 101 case. In the
 12:07:44 18 101 case, you've got a human process and you're
 12:07:47 19 computerizing it. Here, you've got a process a human can't
 12:07:50 20 participate in, which is what the spec says. As a result of
 12:07:53 21 the invention, the human is able to participate in the
 12:07:56 22 process, and the machine's input is the result, Your Honor.
 12:07:59 23 THE COURT: When the probe, the claimed probe is
 12:08:03 24 filtering data positively or negatively, is that something a
 12:08:07 25 human could do?

12:08:07 1 MR. GOLDBERG: You know, I don't think so, Your
 12:08:09 2 Honor. This is incredibly technical stuff. I mean, if you
 12:08:13 3 had an abstract, you know, one piece of data, and you had
 12:08:18 4 this, you know, one thing trying to match it to, maybe.
 12:08:22 5 Practically, no, if it's visible like that way.
 12:08:24 6 In the context of the computer network, Your
 12:08:27 7 Honor, I think what *SR*/said is, you know, human minds are
 12:08:30 8 not equipped to do this in any meaningful sense in the
 12:08:33 9 securities context. You can maybe try to do some small
 12:08:36 10 slice of something, but that's not what this is about, Your
 12:08:36 11 Honor.
 12:08:38 12 So, let me answer as no.
 12:08:40 13 THE COURT: Could a human analyze post-residue
 12:08:42 14 data in a way that the probe, the claimed probe does?
 12:08:44 15 MR. GOLDBERG: I would say no, Your Honor.
 12:08:46 16 THE COURT: Could not?
 12:08:47 17 MR. GOLDBERG: No. And, again, that would be --
 12:08:50 18 THE COURT: Why?
 12:08:50 19 MR. GOLDBERG: Well, and the patent explains
 12:08:52 20 that, and that's where in the background that there's just
 12:08:55 21 too much of it at that point, and there's not the tools and
 12:08:58 22 context needed in order to process this information.
 12:09:01 23 THE COURT: Could a human do it if the human
 12:09:03 24 just had more time?
 12:09:04 25 MR. GOLDBERG: I don't think so, Your Honor.

12:09:06 1 They would still lack the intelligence the hierarchical
 12:09:09 2 structure creates.
 12:09:09 3 THE COURT: Okay. All right. I think we're at
 12:09:12 4 your time, Mr. Goldberg. Thank you.
 12:09:15 5 Why don't I hear a couple minutes of rebuttal
 12:09:19 6 from the other side.
 12:09:24 7 Mr. Desai.
 12:09:25 8 MR. DESAI: Sure. I had their slides up here.
 12:09:28 9 There was a claim here quickly. Well, just let me start
 12:09:30 10 with the post-filtering residue analysis. Okay.
 12:09:33 11 This is a black-box generic analysis. Okay.
 12:09:38 12 The human gets information. That's what the claim says. It
 12:09:42 13 says transmit information. It doesn't say what it's
 12:09:47 14 getting. Could be all the residue data, could be some of
 12:09:49 15 it. Right. That's --
 12:09:51 16 THE COURT: I mean, it seems pretty clear. It's
 12:09:53 17 like the filter filtering out certain data and then it says
 12:09:57 18 certain data is good. Then there's this post-residue data
 12:10:00 19 which is like this in-between data. The other side says
 12:10:04 20 it's that post-residue data which is analyzed by the probe.
 12:10:06 21 But then whatever is sent to the human is going to be some
 12:10:10 22 subset of that.
 12:10:10 23 You disagree?
 12:10:12 24 MR. DESAI: I disagree that's in the claim.
 12:10:13 25 Absolutely.

12:10:13 1 THE COURT: What do you think is happening in
 12:10:15 2 the claim?
 12:10:15 3 MR. DESAI: It says transmit information.
 12:10:17 4 That's what it says. If we -- I'm sorry, if we could switch
 12:10:20 5 over to -- I'm sorry. Sorry, Your Honor. Apologies for
 12:10:24 6 that.
 12:10:24 7 THE COURT: And that information, you're saying
 12:10:27 8 it might be information about that post-residue data, but it
 12:10:30 9 could be information about maybe data that was filtered; is
 12:10:33 10 that right?
 12:10:33 11 MR. DESAI: If we look at all three of these
 12:10:36 12 claims up here, if we look at Step C, transmitting
 12:10:39 13 information about said identified events. It could be all
 12:10:43 14 of the residue data. It could be some of it. It's -- the
 12:10:46 15 idea that this claim is specific in that way is just wrong.
 12:10:50 16 It's not there.
 12:10:51 17 THE COURT: All right. I'm not even sure why it
 12:10:54 18 might matter, though if it did matter, could it be said
 12:10:56 19 arguably that that's a claim-construction-type issue?
 12:10:58 20 MR. DESAI: I don't think so, and it does matter
 12:11:00 21 because I think what we heard is that the human can't
 12:11:04 22 analyze the same data as the probe. And, again, that's
 12:11:08 23 clearly wrong in this patent.
 12:11:10 24 THE COURT: Do you think it's wrong to say that
 12:11:12 25 a human can't filter data in the way that the probe is meant

12:11:15 1 to do it?
 12:11:16 2 MR. DESAI: Not in the way this patent is
 12:11:18 3 claiming it.
 12:11:18 4 THE COURT: Why do you say that?
 12:11:19 5 MR. DESAI: The patent is simply saying, Here is
 12:11:21 6 status data. Is it good or is it bad? A human could
 12:11:23 7 absolutely do that. If you look at their Complaint, they've
 12:11:26 8 pointed to, for example, status data being an IP address,
 12:11:28 9 right. A human can certainly check an IP address against a
 12:11:33 10 good and a bad list. No question about it.

12:11:36 11 The issue is: Can it do it as quick as a
 12:11:38 12 computer? Well, we know that's not -- that's using a
 12:11:41 13 computer as a tool.

12:11:42 14 So, the idea that the filtering and the res --
 12:11:47 15 and the analysis by the probe are somehow different than the
 12:11:50 16 analysis that the human is doing is wrong.

12:11:51 17 THE COURT: To go back, though, so take this
 12:11:53 18 point, right. Can a human filter data in a way or in a
 12:11:57 19 manner that the claim is requiring the probe?

12:11:59 20 And then go back to *SR*!, when *SR*/is talking
 12:12:02 21 about the work on the monitors, and it says, you know, *Cisco*
 12:12:06 22 also submits the asserted claims are so general that they
 12:12:08 23 encompass steps that people can both do in their minds,
 12:12:11 24 allegedly confirming the practical abstract concept.

12:12:14 25 We disagree. This is not the type of human

12:13:31 1 that purpose, and I can't cite to Mr. Desai's oral argument,
 12:13:34 2 what do I cite in the record for that proposition?
 12:13:36 3 MR. DESAI: The fact that a human can do --
 12:13:39 4 THE COURT: The type of filtering that's
 12:13:40 5 claimed, like what part of the record do I cite? What part
 12:13:42 6 of the patent?
 12:13:43 7 MR. DESAI: There's the part of the patent that
 12:13:46 8 we -- for some reason the computer wanted access to the
 12:13:51 9 camera. Let me -- it would be this part of the patent right
 12:13:54 10 here which just says what's positive filtering and what's
 12:13:58 11 negative filtering. It's selecting good information and
 12:14:00 12 discarding bad information. And the part of their Complaint
 12:14:04 13 that talks about a white list and a black list, and these
 12:14:08 14 are -- there's also a case, I believe we cited cases, that
 12:14:11 15 say filtering is just, you know, conventional routine
 12:14:15 16 activity that people have done for who knows how long,
 12:14:19 17 right.
 12:14:19 18 And this is not some special type of filtering.
 12:14:22 19 This is literally good and bad filtering. Okay.
 12:14:28 20 Let me -- I think they didn't cover it. You
 12:14:32 21 have their slide, though, BT Slide Number 5. And this was a
 12:14:38 22 slide that caught my eye that I really wanted to show Your
 12:14:40 23 Honor. And they didn't show it, but I'm going to show it.
 12:14:45 24 Let me get to it really quick.
 12:14:47 25 Right. It says, "The inventors realized that

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12:12:16 1 activity that 101 is meant to exclude. Indeed, we tend to
 12:12:19 2 agree, tend to agree, not even super conclusive, with *SR*/
 12:12:23 3 that the human mind is not equipped to detect suspicious
 12:12:27 4 activity by using network monitors and analyzing network
 12:12:31 5 packets as recited by the claims.

12:12:35 6 I mean, obviously, a human wouldn't be using a
 12:12:37 7 monitor, right. It's whether the human would be doing the
 12:12:39 8 same thing that the computer is doing in the same way. How
 12:12:43 9 do you distinguish what's going on there from what's maybe
 12:12:46 10 known or unknown about the filtering process?

12:12:48 11 MR. DESAI: Right. The way I distinguish what's
 12:12:50 12 going on in *SR*/from what's going on in this case is the
 12:12:53 13 patent specification and the language in this case, which is
 12:12:56 14 different than what's in SRI.

12:12:57 15 In this case, it is talking about the positive
 12:13:01 16 and negative filtering, okay, which the Complaint itself
 12:13:05 17 acknowledges is a white list and a black list. Okay. And
 12:13:09 18 there's no volume amounts. There's no scale issue here.
 12:13:12 19 None of that is in this claim.

12:13:13 20 And the issue is simply: Can a human do the
 12:13:17 21 filtering of an IP address by comparing it to a white list
 12:13:21 22 or a black list? Categorically, they can. The only
 12:13:24 23 difference with the probe is it can do it faster, like all
 12:13:27 24 computers can do things faster than humans.

12:13:29 25 THE COURT: If I was citing to something for

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12:14:51 1 any successful solution needed to balance several competing
 12:14:51 2 interests."
 12:14:56 3 So, this is what the inventors realized. This
 12:14:58 4 is their slide. If you take a look at every single one of
 12:15:01 5 those citations, it's about the security analyst.
 12:15:03 6 The first bullet, there's a quote from that
 12:15:06 7 portion, 24, 20. It says, "Security analysts can escalate
 12:15:09 8 the handling of the incident."
 12:15:11 9 2, 13 to 18, that's talking about analyze by
 12:15:14 10 trained security analysts.
 12:15:16 11 3, 22 is just simply "reduce volume of data
 12:15:20 12 for -- worthy of analysis. We've talked about how just
 12:15:23 13 simply taking computer and reducing what a human should
 12:15:25 14 review is not patent eligible. There's case law that --
 12:15:29 15 Federal Circuit case law that says that explicitly.
 12:15:32 16 And then the last one is, "Security analysts are
 12:15:35 17 personalized personnel specializing in the analysis of
 12:15:37 18 network attacks." These are the quotes from what they put
 12:15:40 19 in their slide about what the inventors realized. It is not
 12:15:43 20 about post-filtering residue analysis.
 12:15:46 21 And if you go to the specification, the
 12:15:49 22 beginning like you mentioned, Your Honor, that is not what
 12:15:52 23 the patent describes as the improvement. And we have to be
 12:15:58 24 guided here, according to the Federal Circuit, by what the
 12:16:00 25 specification tells us is the improvement, not the

12:16:05 1 after-the-fact discussion.
 12:16:07 2 THE COURT: Okay. Mr. Desai, you're about at
 12:16:09 3 your time. So, thank you. I appreciate the arguments from
 12:16:12 4 both sets of counsel.

12:16:13 5 Okay. Before I adjourn for lunch and to think
 12:16:17 6 more about what's been said today, I did mention that I
 12:16:21 7 wanted to -- you know, I've got a bunch of smart folks who
 12:16:25 8 work in patent litigation and have thought about Section 101
 12:16:28 9 issues a lot. I don't know what number these 101 motions
 12:16:32 10 are in terms of that I've decided, but I don't think I'm at
 12:16:36 11 a hundred, but I might be past, you know, 50. So, it's
 12:16:39 12 something I do a lot. And yet, obviously, it's a difficult
 12:16:43 13 area of the law and it's ever changing.

12:16:46 14 And so, I want to try to get the benefit of the
 12:16:49 15 fact that you're all here. If there's anything you could
 12:16:52 16 add to what's already been said that will help me, not only
 12:16:57 17 in these cases, but in other cases. So, I think really the
 12:16:59 18 question I'll ask is just the one that I suggested earlier,
 12:17:02 19 which is -- you know, I'm not really asking for you to make
 12:17:06 20 additional argument about your particular case. It might be
 12:17:09 21 that what you're saying could have some relevance to it, but
 12:17:11 22 I'm asking you to be more general.

12:17:12 23 But is there anything about Section 101
 12:17:15 24 jurisprudence that you think that Courts generally, maybe
 12:17:18 25 today or in general, are not quite getting right all the

12:17:23 1 time, or they need to be kind of thoughtful about, or is it
 12:17:27 2 maybe always analyzed in the right way?

12:17:30 3 Again, like, I'll give you an example just some
 12:17:33 4 of the -- when I asked the question about how in the letter
 12:17:35 5 briefing, you know, there were some cases or portions of
 12:17:38 6 cases that the parties, I mean, which are really helpful.
 12:17:42 7 Like in *American Axle*, I think Judge Dyk talks about the
 12:17:46 8 concept of how how, you know, is very relevant to,
 12:17:51 9 obviously, multiple different components of the, you know,
 12:17:55 10 validity or eligibility analyses, but in different ways.
 12:17:59 11 And, you know, it's the claimed how that's particularly
 12:18:02 12 relevant to eligibility. It's the specification's assertion
 12:18:04 13 of how that's particularly relevant to 112 issues, written
 12:18:09 14 description, enablement. And I don't think I had seen them
 12:18:11 15 before. It's a really helpful way of kind of like, yeah,
 12:18:13 16 that's right, of course.

12:18:14 17 Any way, if there's anything like that that
 12:18:16 18 you-all have been thinking or like, you know, just to help a
 12:18:20 19 federal judge that is doing this a lot, I want to get the
 12:18:23 20 benefit of your thoughts.

12:18:24 21 So, let me first turn, and not that there has to
 12:18:27 22 be. We may have said all that can be said really about
 12:18:30 23 these issues today.

12:18:31 24 But anything on the Plaintiff's side here on our
 12:18:33 25 first case that BT would like to share?

12:18:36 1 Mr. Goldberg.
 12:18:37 2 MR. GOLDBERG: Nothing comes to mind, Your
 12:18:39 3 Honor.
 12:18:39 4 THE COURT: Okay. All right.
 12:18:40 5 And on Defendant's side?
 12:18:41 6 Mr. Desai.
 12:18:41 7 MR. DESAI: Your Honor, I have a quick comment,
 12:18:43 8 and it has to do with what claims should be addressed in a
 12:18:46 9 motion to dismiss. And I think that's an area of
 12:18:49 10 uncertainty as to -- and it is particularly -- there is,
 12:18:51 11 obviously, relevance to our cases. We have noted in our
 12:18:55 12 papers that Your Honor can dismiss this Complaint without
 12:18:58 13 addressing the dependent claims, and there is some case law
 12:19:01 14 from Delaware that confirms that.

12:19:03 15 There's a little guidance from the Federal
 12:19:05 16 Circuit. There's a recent case, I think, where a Plaintiff
 12:19:07 17 was requesting that unasserted claims should not be
 12:19:10 18 addressed and the Federal Circuit agreed.

12:19:11 19 THE COURT: Right. So, that's the -- it begins
 12:19:14 20 with a H, I think. I think it was a post decision, but I
 12:19:16 21 think one of the parties cited that. I think it was
 12:19:19 22 Postscript that cited it in. Somebody cited it in.

12:19:20 23 It's the Federal Circuit case, I think it was
 12:19:23 24 Judge Bryson, was basically saying, I think, in that case,
 12:19:26 25 it's a little complicated because not only were the other

12:19:30 1 claims not specifically referenced in the Complaint, but I
 12:19:33 2 think at oral argument the patentee was saying, Yeah, we're
 12:19:36 3 not asserting that.

12:19:37 4 MR. DESAI: Yeah.
 12:19:38 5 THE COURT: Harder call might be like what if
 12:19:41 6 the Complaints, like they always do, say at least Claim 1,
 12:19:44 7 don't say much in the way of what about the other ones.
 12:19:47 8 When you don't have that kind of admission, are the other
 12:19:49 9 claims in or out for purposes of being eligible to assess?

12:19:53 10 MR. DESAI: Well, I think the issue there is
 12:19:56 11 this is a *Qbala-Twombly* pleading issue. I mean, some would
 12:20:01 12 say patent cases are not special. And when you're
 12:20:03 13 dismissing a Complaint, you're dismissing what's pled.

12:20:06 14 THE COURT: And on that front, let me just ask
 12:20:07 15 you -- this is a vague question that doesn't necessarily
 12:20:09 16 have to do with 101, right, but I think about it sometimes.

12:20:12 17 So, the way I think it works in patent
 12:20:13 18 litigation is, you know, the Complaint will say, you know,
 12:20:15 19 Patent Number '123, at least Claim 1, right, and then it
 12:20:20 20 states a claim as to why there's, you know, plausible
 12:20:23 21 assertion of infringement as to Claim 1 of the '123 patent.

12:20:27 22 And then like it seems like everyone just agrees
 12:20:31 23 by way of like mutually asserted structure that the way
 12:20:35 24 we're going to do this forward is we're not going to make
 12:20:37 25 the patentee go back and amend the Complaint to say Claim 1,

12:20:41 1 Claim 2 and Claim 3. The patentee is going to provide
 12:20:44 2 infringement contentions. Everybody knows that they could
 12:20:46 3 literally just go back and then attach the contentions and
 12:20:48 4 say that's enough to add those claims.

12:20:50 5 But like for other areas of the law, right,
 12:20:54 6 wouldn't you be like having to say, plausibly, that like
 12:20:58 7 Claim 2 or Claim 3?

12:20:59 8 MR. DESAI: I think this is a major issue that I
 12:21:02 9 don't know how it would get to the Federal Circuit. But in
 12:21:05 10 other areas of the law, especially, you know, you read in
 12:21:08 11 the pleadings standards are designed so that you cannot use
 12:21:11 12 Complaints as a fishing expedition to look for an additional
 12:21:16 13 pleading. If your operative pleading is deficient because
 12:21:21 14 what you've pled is ineligible, the Complaint is dismissed.
 12:21:25 15 You may seek leave to amend your Complaint if that's
 12:21:29 16 appropriate and if it's not futile, for example. But those
 12:21:32 17 are all pleading issues.

12:21:33 18 And I think what we're mixing up is pleading
 12:21:36 19 standards granting patent specifications some sort of
 12:21:39 20 special unique pleading standards versus docket control
 12:21:43 21 procedures like infringement contentions, which are very
 12:21:46 22 different.

12:21:47 23 THE COURT: Put differently, if you have a
 12:21:50 24 particular contract claim and you in your Complaint, List
 12:21:52 25 two theories as to why that contract was breached, right,

12:23:05 1 MR. DESAI: Yes.
 12:23:05 2 THE COURT: If the patentee goes on to talk
 12:23:07 3 about other claims in the patent and why it is that they add
 12:23:11 4 an additional thing that's relevant to the eligibility mix,
 12:23:15 5 then fairly the Defendant in the reply brief has got to
 12:23:18 6 address those other claims, too, that they've been raised.

12:23:21 7 MR. DESAI: Yes.
 12:23:22 8 THE COURT: And I guess presumably would say
 12:23:24 9 they have been asserted, even if maybe they're not talked
 12:23:26 10 about in the Complaint. Do you think that's all right?

12:23:28 11 MR. DESAI: The part I question is whether
 12:23:30 12 they've asserted --

12:23:31 13 THE COURT: Yeah.

12:23:32 14 MR. DESAI: -- which is the pleading standards
 12:23:34 15 and whether you need to dismiss allegations that are not in
 12:23:38 16 the Complaint.

12:23:39 17 THE COURT: Okay. And if the patentee said,
 12:23:43 18 Well, whatever we said in the Complaint, I'm saying by
 12:23:45 19 raising claim "X" in our brief, we're asserting this. That
 12:23:51 20 sounds like from that recent Federal Circuit case, that
 12:23:53 21 might be enough.

12:23:54 22 MR. DESAI: It might be. It might be.

12:23:56 23 THE COURT: All right. Anything further,
 12:23:57 24 Mr. Desai?

12:23:58 25 MR. DESAI: That was it, Your Honor.

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 12:21:56 1 it's because they've breached Section 1.2 and 1.4. And then
 12:22:01 2 later in the case, you say to the other side, I've got three
 12:22:05 3 more that were pressing here in Section 6.2.

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12:24:00 1 MR. GOLDBERG: Your Honor, as that was directed
 12:24:02 2 primarily at our case, can I rebut briefly?

12:24:05 3 THE COURT: Sure. Sure.

12:24:06 4 MR. GOLDBERG: Thank you. Your Honor, just the
 12:24:07 5 Complaint here has broad statements of infringement with
 12:24:10 6 regard to the patents in general and also includes a
 12:24:13 7 specific example, but it describes a lot of the
 12:24:17 8 functionality like cross-probe correlation in the Complaint
 12:24:20 9 expressly. And I think there's no question that Defendants
 12:24:24 10 here were under notice. That was part of --

12:24:26 11 THE COURT: I want to try to keep it out of
 12:24:28 12 that. I know what you're saying. Some of this may have
 12:24:30 13 some relation. Let me talk more generally with you about
 12:24:33 14 like the representative analysis claim.

12:24:35 15 Like you think like if you have a Complaint that
 12:24:37 16 says, you know, patent '123, at least Claim 1 is infringed
 12:24:43 17 and explains why, and then we have an eligibility challenge
 12:24:47 18 at the Rule 12 stage, if the Plaintiff doesn't say anything
 12:24:51 19 else, like, you know, only talks about Claim 1, doesn't
 12:24:55 20 mention anything about any other claims in its briefing or
 12:24:57 21 argument, is the way that the judge should view that as,
 12:25:00 22 well, only Claim 1 is asserted in the case; that's the only
 12:25:03 23 claim I can address at a Rule 12 stage?

12:25:05 24 MR. GOLDBERG: Well, as Your Honor noted, it's
 12:25:08 25 an efficiency claim, right. And I think there's a standard

12:25:11 1 that there's a notice of pleading, so they may just come
 12:25:13 2 back around and define a different claim. It seems like if
 12:25:16 3 you have a situation where the parties are on notice that
 12:25:17 4 the other claims may be asserted for the functionality
 12:25:21 5 that's described, it's probably more efficient to rule on
 12:25:23 6 all in one shot. But whether Your Honor has to is a
 12:25:26 7 different question.

12:25:26 8 THE COURT: I guess I could always ask the
 12:25:28 9 Plaintiff, right, at the argument, Look, are you asserting
 12:25:30 10 other claims? And if the Plaintiff says either yes or,
 12:25:34 11 well, we could or we might be, that might be enough to keep
 12:25:37 12 them in?

12:25:37 13 MR. GOLDBERG: And the other point, Your Honor,
 12:25:38 14 is a bit of inconsistency between this and the Delaware
 12:25:42 15 local rules which would kind of define time for the
 12:25:45 16 Plaintiff to identify which specific claims that are
 12:25:47 17 infringed. It would really be a new standard to force the
 12:25:49 18 Plaintiff to identify all the claims they are alleging
 12:25:52 19 infringed expressly in the Complaint well ahead of the time
 12:25:55 20 specified in our local rules.

12:25:58 21 THE COURT: No, I understand. I think it's a
 12:25:59 22 question of, Well, what do you do in the interval? Like
 12:26:02 23 what does it mean to not to have done that yet for purposes
 12:26:04 24 of what's being asserted?

12:26:06 25 MR. GOLDBERG: Yeah.

12:27:24 1 and that appears specific. I would say that maybe one thing
 12:27:28 2 that the District Courts might be able to do to help this
 12:27:31 3 out is to be a little bit more deliberate than the parties
 12:27:36 4 tend to be on the doctrines that are being applied. If the
 12:27:39 5 Federal Circuit has two lines of case law, one about
 12:27:42 6 specificity, for example, and another one about
 12:27:44 7 technological inventions, and those are competing threads,
 12:27:48 8 and they're being applied separately, they're being called
 12:27:52 9 out separately.

12:27:52 10 In the opinions, it should be a bit of an
 12:27:58 11 enunciation. This is what we're applying. This is why this
 12:28:00 12 is most applicable here. These are the pieces of this
 12:28:05 13 particular doctrine.

12:28:06 14 THE COURT: And in that regard, if we're talking
 12:28:08 15 about claims to computer software, or computer
 12:28:13 16 functionality, in your view, are there really kind of two
 12:28:16 17 lines of authority? One that would say, Look, there's a
 12:28:20 18 path to eligibility that's simply about specificity and
 12:28:25 19 particularity separate and apart from unconventionality?
 12:28:30 20 And then there's a path that's like an unconventional use of
 12:28:34 21 computer technology path, and those are two different paths?
 12:28:37 22 Is that what you're suggesting, even in that
 12:28:38 23 realm?
 12:28:39 24 MR. WEINBERG: Yeah, this is a bit murky,
 12:28:41 25 because they are discussing *TecSec*, for example, Judge

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12:26:06 1 THE COURT: Okay. Thank you, Mr. Goldberg. I
 12:26:10 2 appreciate that.

12:26:10 3 Let me give counsel for the other guys a chance
 12:26:12 4 to add anything they'd like to add about 101 law that I
 12:26:16 5 should be thinking about generally. Let me ask in the
 12:26:21 6 Attentive cases, the Plaintiff's counsel, if there's
 12:26:22 7 anything that they'd like to add.

12:26:25 8 Mr. Weinberg.

12:26:27 9 MR. WEINBERG: Sure. It's a very big question,
 12:26:33 10 and I think that to say the District Court is getting
 12:26:38 11 something inconsistent, the Federal Circuit is getting
 12:26:40 12 consistent, I think there's very quibble in that latter
 12:26:46 13 camp. So, it's putting the District Courts in a very
 12:26:49 14 difficult spot because the Federal Circuit's opinions are
 12:26:51 15 quite panel specific. And often the briefing, because of
 12:26:57 16 that, puts the District Court in a bind.

12:26:59 17 It seems as though Plaintiff's counsel submits a
 12:27:03 18 brief that says the word specific over and over again. The
 12:27:05 19 Defendant submits something that says generic and
 12:27:08 20 conventional over and over again.

12:27:10 21 THE COURT: I think the words specific, and
 12:27:12 22 particular and concrete are like whatever that means is like
 12:27:17 23 a key to 101.

12:27:18 24 MR. WEINBERG: I think it means that you're
 12:27:20 25 about to read a long run-on sentence what the claim is about

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12:28:47 1 Taranto says it's two different inquiries that we find
 12:28:49 2 relevance to computer-implemented inventions with
 12:28:51 3 specificity. And the technical aspect of it, how this is a
 12:28:56 4 technical invention.

12:28:58 5 The specificity stuff comes from 200 years ago.
 12:29:01 6 It's from all those, a variety, and those tests that
 12:29:07 7 predates *Alice* by a long shot. *Alice* is more of a
 12:29:10 8 procedural mechanism for getting at that underlying
 12:29:13 9 question. The technical --

12:29:14 10 THE COURT: *Alice* is really what kind of gave us
 12:29:16 11 this, you know: Is it just do it on a computer or is it
 12:29:21 12 unconventional use kind or at least -- right? Is that kind
 12:29:25 13 of right?

12:29:26 14 MR. WEINBERG: So, what I was trying to say was
 12:29:29 15 *Alice* is a procedural frame. Step two, step two is sort of
 12:29:33 16 just there to help you work through procedurally to get to
 12:29:37 17 the underlining question. The underlining question is the
 12:29:40 18 specificity that you need enough room for something else to
 12:29:43 19 improve upon what you did.

12:29:46 20 Alice was a response to a long line of failures,
 12:29:53 21 I would say, from the Supreme Court starting in 1972,
 12:29:56 22 *Benson*, where they just didn't really grapple with what it
 12:30:00 23 means to have a software invention. And for a long time,
 12:30:03 24 the Patent Office was granting things that were just do it
 12:30:06 25 on a computer. Right.

12:30:08 1 And so, that's why *Alice* did have to say the
 12:30:11 2 goal of automation using a generic computer is -- that
 12:30:18 3 doesn't meet the specificity requirement. It didn't meet
 12:30:20 4 those terms.

12:30:21 5 THE COURT: That's what I was going to say, what
 12:30:22 6 you said. I've always thought of it as like I thought of
 12:30:24 7 this whole unconventional use of computer technology piece
 12:30:29 8 as being about specificity, or particularity or concreteness
 12:30:33 9 to take us out of this result land or abstract idea land in
 12:30:37 10 the sense that, like, what the Courts were saying was, We're
 12:30:41 11 just going to say that adding do it on a computer or its
 12:30:45 12 equivalent is indistinguishable from claim-to-abstract idea.

12:30:50 13 So, if you have claim-to-abstract idea and all
 12:30:53 14 you're adding is do it on a computer or words to that
 12:30:57 15 effect, it's indistinguishable from this. And the whole
 12:31:03 16 line of case law about are the adds, do they amount to the
 12:31:07 17 unconventional use of computer technology, is really about:
 12:31:09 18 Are they sufficiently specific enough to take us out of
 12:31:12 19 abstract idea land when it comes to computer-based patents.

12:31:15 20 Do you think that's right or wrong?

12:31:17 21 MR. WEINBERG: I think that's right.

12:31:17 22 THE COURT: Okay.

12:31:18 23 MR. WEINBERG: I think that's right. *Alice* was,
 12:31:21 24 I think, the first decision to say that this 101 exception
 12:31:27 25 root of it is the breadth of the claim, right. If you're

12:33:01 1 to this issue about computers in particular. And the issue
 12:33:08 2 you have with computers is they can do anything just by
 12:33:12 3 writing lines of code. And I think that's where a lot of
 12:33:16 4 this came from.

12:33:17 5 And as somebody who earlier in my career drafted
 12:33:20 6 patents and had to actually grapple with what do you do when
 12:33:24 7 you write a patent, I sort of know how patent prosecutors
 12:33:30 8 think about things. And the way they think about it is just
 12:33:35 9 add words, right. Like I can just keep adding steps. And
 12:33:39 10 we used to have a thing, and it's funny, I was talking about
 12:33:41 11 a younger colleague of mine, and we had error limitations.
 12:33:45 12 And error limitations are you put in things in your computer
 12:33:49 13 claim like a memory talking to a processor or talking to
 12:33:53 14 whatever and you say like, well, yeah, that makes the claim
 12:33:56 15 look more robust, right, because I put in things that look
 12:34:01 16 specific, but --

12:34:02 17 THE COURT: More words.

12:34:04 18 MR. MARTINELLI: -- we laugh to ourselves and
 12:34:06 19 say, yeah, but that's all in there any way, but at least
 12:34:09 20 like I'm not having a claim that's one line or two lines
 12:34:12 21 that's just the function.

12:34:13 22 And I think that's really what a lot of this,
 12:34:17 23 you know, post-Internet age 101 law is grappling with. It's
 12:34:22 24 should we be granting the patents to people that are just
 12:34:25 25 figuring out like functional ideas and things that are

12:31:32 1 just trying to automate using a generic invention in a
 12:31:39 2 generic computer, that's not going to be enough to be more
 12:31:42 3 specific than just the abstract idea. So, that was in
 12:31:45 4 *Alice*, and that's -- you're absolutely right to have that.

12:31:48 5 *Alice*, also, of course, had language about the
 12:31:53 6 conventional limitations, and that was expanded as its own
 12:31:58 7 set of case law. But what I was suggesting in the District
 12:32:03 8 Courts, for example, is that when you're saying that one
 12:32:07 9 limitation does not get you anywhere because it's generic, a
 12:32:11 10 generic computer, that comes from *Alice*, automation using a
 12:32:14 11 computer. There's no other way to automate, right. So,
 12:32:17 12 it's the generic. It's the parents. It's the genus.

12:32:18 13 Whereas, the conventional limitation or
 12:32:22 14 exclusivity as such comes from. That's where it
 12:32:26 15 substantially more comes from. That's a different sort of
 12:32:30 16 attack on the claim limitations themselves.

12:32:34 17 And so, just to be a little bit more specific
 12:32:37 18 when -- instead of saying, oh, it's all generic conventional
 12:32:40 19 activity that was always done and mush it all together, it
 12:32:44 20 may encourage more clear case law. I'm not sure.

12:32:50 21 THE COURT: Okay. All right. Thank you,
 12:32:51 22 Mr. Weinberg. We'll leave it there.

12:32:52 23 Thank you. Let me ask counsel for Emotive, what
 12:32:59 24 would you like to say?

12:33:00 25 MR. MARTINELLI: I think I would like to respond

12:34:28 1 real-world processes and applying them to this specific
 12:34:32 2 context and allow them to get a patent just because they put
 12:34:37 3 in enough words to get a patent?

12:34:39 4 And that's why it's not necessarily about: Is
 12:34:44 5 this new or not? And novelty and obviousness sort of is a
 12:34:49 6 separate aspect.

12:34:50 7 And so, I don't see specificity and technical
 12:34:54 8 improvement of the computer as two separate things. I think
 12:34:58 9 they're two different facets of really like looking at the
 12:35:01 10 same issue.

12:35:02 11 And the issue is: Are you improving on the
 12:35:05 12 computer or did you just have a concept and say, you know,
 12:35:09 13 my client came to me with this business that they have. The
 12:35:12 14 business is just, you know, a new Internet company. I've
 12:35:16 15 got to write them a claim. And as a clever patent attorney,
 12:35:20 16 I'm going to just throw in as much computer words as I can
 12:35:23 17 so that can be an argument that I can do that. And that's
 12:35:26 18 why --

12:35:26 19 THE COURT: If you had to say, like, what
 12:35:28 20 amounts to improving a computer, you know, like the easiest
 12:35:32 21 way, how do we know if we're improving the computer or
 12:35:40 22 improving how a computer works versus not? Well, the way
 12:35:44 23 you know that is blank.

12:35:45 24 MR. MARTINELLI: Yeah, it's you look at the
 12:35:47 25 cases where they find that, and usually there's some new

12:35:51 1 computer technology that if you asked a programmer or if you
 12:35:55 2 asked a computer engineer: Is that interesting, they would
 12:35:58 3 say, yeah, as a computer engineer, as a software programmer,
 12:36:04 4 that's an interesting treat to me. It's not just me taking
 12:36:08 5 somebody's business plan and writing code to do it.

12:36:11 6 So, if you look at things like *Enfish* where it's
 12:36:14 7 like, oh, no, entirely new programmatic structure for doing,
 12:36:19 8 you know, analysis of this data or if you look at the claims
 12:36:22 9 where they talk about, oh, well, we're going to put -- I
 12:36:25 10 think your *Nielsen* case was like that, we're going to put
 12:36:29 11 two monitors or two probes, probes, monitors, sensors like
 12:36:34 12 in two different places.

12:36:35 13 THE COURT: *Bayliss* is a case that talks about
 12:36:37 14 sensors here and sensors here.

12:36:40 15 MR. MARTINELLI: Right. So, I think that idea
 12:36:43 16 of specificity and technical innovation are both getting at
 12:36:49 17 the same nugget, which is we've created this tool, this
 12:36:54 18 computer that you may do anything, right. And there's --
 12:36:58 19 you come to me with any idea and I can write you code to do
 12:37:01 20 it.

12:37:02 21 And so, are we going to give every single person
 12:37:06 22 a patent on moving some idea they have and embodying that
 12:37:11 23 idea in software code? That led to all of the dot.com cases
 12:37:16 24 in the early 2000s, and that's what all this 101 stuff was
 12:37:20 25 reacting to.

12:37:21 1 And so, the law says, No, let's look and see
 12:37:24 2 that you're actually doing something that's interesting from
 12:37:25 3 a technical perspective. And maybe you can do it because
 12:37:28 4 you're really getting down into the specificity and say, No,
 12:37:32 5 this specific thing is new and unique. I write a claim that
 12:37:36 6 really gets at what's new or you look at it and you say,
 12:37:42 7 Yeah, here's the concept. You know, maybe some of the
 12:37:47 8 shorter claims where they find this, here's the concept that
 12:37:50 9 is a new technical structure that gets to that concept.
 12:37:53 10 It's really like: What is technically interesting to
 12:37:55 11 computer people?

12:37:56 12 THE COURT: And I think if it turns on that, you
 12:37:58 13 know, like is this an add -- is this add -- is this software
 12:38:01 14 add technically interesting enough for the computer to
 12:38:03 15 account for purposes of non-result, non-abstractness, the
 12:38:06 16 challenge at the Rule 12 stage, of course, is that we often
 12:38:09 17 don't have necessarily that declaration from that person
 12:38:12 18 saying yes or no. And sometimes it seems like what the
 12:38:14 19 courts are doing is: Well, what do we have? We've got the
 12:38:16 20 patent.

12:38:17 21 So, they're trying to look for: Does the patent
 12:38:19 22 tell me whether a computer person might say that this is
 12:38:23 23 enough of an interesting add? And sometimes it seems like
 12:38:26 24 that's how the cases break.

12:38:28 25 It's does the patent tell you enough to make you

12:38:29 1 think or give a hint that this is enough to count.
 12:38:33 2 MR. MARTINELLI: And, again, crafty-like --
 12:38:35 3 certainly, post-*Alice* crafty patent drafters will do the
 12:38:38 4 best that they can to try and make that case in the spec.
 12:38:43 5 And people know that they can do it. And when you look at
 12:38:46 6 the spec, if they don't have anything, right, if it's just,
 12:38:48 7 well, what am I really saying that's interesting, it's about
 12:38:54 8 the end result. It's not about the way I'm doing it. It's
 12:38:58 9 not about the thing that the computer programmer would think
 12:39:01 10 is interesting.

12:39:01 11 That's a huge signal that you've got a 101
 12:39:05 12 issue. And, you know, post-*Alice*, you know, you go and you
 12:39:10 13 hammer at your client, and you say: What can you tell me?
 12:39:13 14 Like what did you do that's really interesting and that like
 12:39:17 15 a computer programmer would find interesting? And you try
 12:39:19 16 and get that in your spec and you try to put a big red flag
 12:39:23 17 on it and say that, Hey, this is something that's not
 12:39:25 18 abstract, and it is a real invention.

12:39:27 19 THE COURT: Okay. We'll leave it there.
 12:39:29 20 Thank you, Mr. Martinelli.
 12:39:32 21 And I'll ask Postscript's counsel. Mr. Novikov.
 12:39:32 22 MR. NOVIKOV: I'll let Mr. Martinelli have the
 12:39:36 23 last word.
 12:39:36 24 THE COURT: Well, good enough. Counsel, thank
 12:39:37 25 you for your thoughts, both on these cases, which are

12:39:41 1 challenging, and then just on the law generally, which is
 12:39:43 2 also challenging.
 12:39:44 3 Okay. So just programmatically what we'll do,
 12:39:48 4 we'll take a break. It's about 12:40. I'll ask at least
 12:39:51 5 one representative for each party to be back in the room by
 12:39:55 6 3:00 p.m. That's like a goal. I'm hopeful I could be back
 12:40:00 7 by 3:00. I'm positive I'll be back by 4:00, but it could be
 12:40:06 8 as early as 3:00. So, I'd like to have folks here in case
 12:40:08 9 we can get started that early.
 12:40:10 10 My goal will be to take what I heard, think
 12:40:12 11 about it, talk about it. My goal is to try to provide
 12:40:16 12 decision today on these motions, so the parties can have
 12:40:19 13 answers and they can use them as answers to move forward in
 12:40:22 14 the case. And I will plan to do that, attempt to do that.
 12:40:27 15 It's theoretically possible if I believe that
 12:40:29 16 what's been said today changes the equation in a way that I
 12:40:32 17 can't fairly do, that then I won't, but my goal will be to
 12:40:37 18 provide decisions then which I'll read orally to the
 12:40:39 19 parties. And then we'll conclude, and I think we should be
 12:40:43 20 concluding certainly no later than 5:00, perhaps before
 12:40:47 21 then.
 12:40:47 22 All right. So, we'll ask at least one
 12:40:49 23 representative, and certainly as many of you are welcome to
 12:40:52 24 come back as would like, from each party to be here by
 12:40:55 25 3:00 p.m. And I'll try to have my clerk let you know if

12:40:59 1 we're going to be delayed. If it's not going to be 3:00, be
 12:41:02 2 closer to 4:00, I'll have my clerk let you know that. Let's
 12:41:06 3 assume we'll come back at 3:00, and I'll take the bench and
 12:41:09 4 make some decisions then.

12:41:10 5 With all that said, the Court will stand in
 12:41:12 6 recess.

12:41:12 7 DEPUTY CLERK: All rise.

01:08:25 8 (Luncheon recess was taken.)

01:09:44 9 DEPUTY CLERK: All rise.

03:01:06 10 THE COURT: You can be seated. Good afternoon.

03:01:17 11 From experience, I know I'm going to need a lot of water.

03:01:21 12 So, all right. Let's go on the record.

03:01:24 13 Thank you all, again, as we are back in court
 03:01:26 14 now, and I am prepared to render my decisions on the motions
 03:01:31 15 that were argued today in these various cases.

03:01:35 16 So, as I begin this afternoon, let me first make
 03:01:38 17 a few introductory comments. Today I'll be providing
 03:01:41 18 decisions in these three cases orally here in court. For
 03:01:45 19 those decisions that I announce orally today, I also intend,
 03:01:49 20 for purposes of clarity and convenience, to later issue a
 03:01:53 21 written opinion on the docket. It is simply meant to
 03:01:56 22 transcribe what I've said here today and also to add
 03:01:59 23 relevant citations when needed.

03:02:02 24 Although I'm issuing decisions orally today, I
 03:02:05 25 want to assure the parties that the process I've used to

03:03:25 1 argument with a large number of excellent counsel
 03:03:27 2 representing all of these various parties. I thank all of
 03:03:30 3 you for your efforts today.

03:03:32 4 The Courts often set out the relevant legal
 03:03:35 5 standards for review of a Section 101-related Rule 12(b)(6)
 03:03:39 6 motion at the pleading stage, including in the case of
 03:03:42 7 *Genetics, LLC vs. Meta Co.* The Court hereby incorporates by
 03:03:47 8 reference its discussion in *Genetics* of these legal
 03:03:50 9 standards and will follow the standards herein as to all the
 03:03:54 10 matters that I'll discuss today, unless otherwise noted.

03:03:58 11 With that said, let me move on to the first case

03:04:01 12 that I'll discuss, which was the case that was argued last

03:04:05 13 today during our hearing. The first case in which I'll

03:04:09 14 provide an opinion is *British Telecommunications, PLC vs.*

03:04:13 15 *Palo Alto Networks, Inc.* It's Civil Action 22-1538-CJB.

03:04:20 16 The Defendant, *Palo Alto Networks*, has filed a

03:04:22 17 motion to dismiss pursuant to Rule 12(b)(6) arguing that the
 03:04:26 18 Complaint should be dismissed on Section 101-related subject
 03:04:29 19 matter eligibility rights.

03:04:31 20 Here, Plaintiffs, *British Telecommunications PLC*

03:04:34 21 and *BT Americas, Inc.* filed suit alleging the infringement

03:04:38 22 of two patents, the United States Patent Number 7,159,237 or

03:04:44 23 the '237 patent, and U.S. Patent Number 7,895,641, or the

03:04:49 24 '641 patent.

03:04:50 25 The patents are related. They share a common

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03:02:07 1 assess these motions has been a rigorous one. I personally
 03:02:11 2 spent between 50 and a hundred hours of my time reviewing
 03:02:14 3 the briefs in these cases, analyzing the cases and record
 03:02:18 4 citations therein, and formulating these decisions, to say
 03:02:22 5 nothing of the time that my law clerks have spent on these
 03:02:25 6 matters as well.

03:02:26 7 My oral decisions today, as you'll see in a
 03:02:29 8 minute, will be quite lengthy. And while length is not
 03:02:33 9 always an indicator of rigorous analysis, I hope that you'll
 03:02:36 10 conclude in these cases it is.

03:02:37 11 Additionally, I should also note that I found
 03:02:41 12 there to be real efficiencies in holding argument in these
 03:02:44 13 various cases in which patent eligibility is challenged at
 03:02:48 14 one time, as we've done today. In many of the briefs across
 03:02:52 15 the cases, the same opinions from the United States Court of
 03:02:55 16 Appeals, from the Federal Circuit or from the Supreme Court
 03:02:57 17 of the United States have been cited. And having the
 03:03:00 18 experience of reading those decisions again and again over
 03:03:03 19 the span of the last few weeks has been very helpful for me.
 03:03:07 20 It helps to reinforce, in my mind, what the facts of those
 03:03:10 21 decisions really are and what aspects of those cases made a
 03:03:13 22 difference in their outcomes.

03:03:15 23 It also helps me to see patterns across the
 03:03:18 24 various cases. And I've also benefited by being able to
 03:03:24 25 discuss issues regarding Section 101 law here today at oral

03:04:53 1 specification, and they have the same title, which is

03:04:58 2 "Method and System For Dynamic Network Intrusion Monitoring
 03:05:01 3 Detection and Response."

03:05:03 4 The '237 patent, as we will see, contains
 03:05:06 5 certain representative claims. And so, I will focus on that
 03:05:09 6 patent alone here.

03:05:10 7 The patent has 42 claims in total. While

03:05:15 8 Defendant argues in its briefing that Claim 18 is

03:05:18 9 representative for Section 101 purposes, not only the

03:05:22 10 independent claims in that patent, but of all independent

03:05:24 11 claims in both patents that are being asserted in this case.

03:05:28 12 And Plaintiffs never explicitly disputed in the briefing

03:05:31 13 that Claim 18 was representative of the other asserted

03:05:34 14 independent claims.

03:05:36 15 Claim 18 recites a security monitoring system

03:05:39 16 for a computer network. The system utilizes a plurality of
 03:05:43 17 sensors, a secure operation center or SOC and at least one
 03:05:48 18 probe. And that probe is configured to do the following

03:05:52 19 five things.

03:05:53 20 First, to collect status data from at least one

03:05:56 21 sensor that monitors at least one component of the network.

03:06:00 22 Second, to analyze that status data, to identify

03:06:04 23 potential security-related threats wherein the analysis

03:06:07 24 includes an initial filtering process, and then an

03:06:11 25 additional analysis of what the patents call "post-filtering

03:06:15 1 residue" which is data that is "either discarded nor
03:06:20 2 selected" by the initial filtering process.

03:06:23 3 Third, to transmit information about the
03:06:26 4 identified events to an analyst associated with the SOC.

03:06:31 5 Fourth, to receive feedback from an analyst
03:06:33 6 based on empirically-derived information reflecting the
03:06:36 7 operation of the security monitoring system.

03:06:38 8 And, fifth, to dynamically modify the analysis'
03:06:42 9 capability of a probe based on that received feedback.

03:06:45 10 In its briefing, to the extent that they ever
03:06:47 11 address a dependent claim in the patents, Plaintiffs mainly
03:06:50 12 focus on the requirement found in Claim 14 of the '237
03:06:54 13 patent that requires that the analyst at the SOC or the SOC,
03:06:59 14 otherwise, utilizes "cross-probe correlation."

03:07:03 15 This is seen, for example, on Pages 5 and 12 of
03:07:08 16 Plaintiff's answering brief in which they make reference to
03:07:10 17 Claim 14 and its computerized use of cross-probe
03:07:15 18 correlation.

03:07:15 19 And likening this, the Court will focus on
03:07:18 20 analyzing Claim 18 of the '237 patent, treating it as a
03:07:21 21 representative claim for all asserted independent claims.

03:07:24 22 And it will also address Claim 14 of that patent in that
03:07:28 23 Plaintiffs have suggested that that claim is representative
03:07:30 24 of any dependent claims that discuss the addition of
03:07:34 25 cross-probe correlation or its equivalent.

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03:07:36 1 Moreover, as a general matter, when the Court is
03:07:39 2 discussing the specification of one of the two asserted
03:07:41 3 patents, it will make use of the '237 patent specification
03:07:45 4 understanding that that specification is a little different
03:07:48 5 from the '641 patent specification.

03:07:52 6 In step one, Defendant argues that the asserted
03:07:54 7 claims are directed to the abstract idea of "collecting,
03:07:57 8 filtering, analyzing and transmitting data and then making
03:08:02 9 modifications based on human feedback."

03:08:04 10 Plaintiffs don't contest in their briefing that
03:08:07 11 the purported abstract idea here is, in fact, an abstract
03:08:11 12 idea, and the Court concludes that it is. A claim to an
03:08:14 13 abstract idea has been described by the Federal Circuit as
03:08:17 14 one directed to "a disembodied concept, a basic building
03:08:22 15 block of human ingenuity untethered from any real-world
03:08:26 16 application." The Defendant's proffered abstract idea seems
03:08:30 17 to fit that characterization.

03:08:31 18 Moreover, the Federal Circuit has explained that
03:08:33 19 certain basic methods of utilizing data like these, standing
03:08:38 20 alone, cannot amount to something more than an abstract
03:08:41 21 idea. For example, in *International Business Machines Corp.*
03:08:47 22 *Vs. Zillow Group, Inc.*, the Federal Circuit said that,
03:08:50 23 "Identifying, analyzing and presenting certain data to a
03:08:53 24 user is not an improvement specific to a computer." And
03:08:56 25 that "claims directed to collection of information

03:09:00 1 comprehending the meaning of that collected information and
03:09:03 2 indication of the results all in a generic network computer
03:09:07 3 operating in its normal expected manner" are claims directed
03:09:11 4 to an abstract idea.

03:09:14 5 In *Electric Power Group, LLC vs. Alstom, S.A.*,
03:09:17 6 the Federal Circuit said that, "Nearly requiring the
03:09:19 7 selection and manipulation information by itself does not
03:09:23 8 transform" an otherwise abstract idea into something more.

03:09:27 9 In cases like *BASCOM Global Internet Services, Inc. vs. AT&T Mobility, LLC*, the Federal Circuit noted that
03:09:30 10 "filtering content is an abstract idea because it is a
03:09:35 11 long-standing, well-known method of organizing human
03:09:38 12 behavior, similar to concepts previously found to be
03:09:40 13 abstract."

03:09:45 15 And in, *In Re: Rosenberg*, the Federal Circuit
03:09:48 16 explained that the idea of determining whether to "fine
03:09:53 17 tune" a system, including by providing instructions to
03:09:56 18 modify certain procedures or parameters amounts to an
03:09:59 19 abstract idea.

03:10:00 20 So, we know that if it's right to say that all
03:10:02 21 these claims are directed to this collecting data and or
03:10:06 22 analyzing data, and or filtering data, and or transmitting
03:10:10 23 data and or modifying data based on analysis, well that
03:10:14 24 cannot be enough to save the claims in step one.

03:10:17 25 But Plaintiffs contend that the '237 patent is

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03:10:19 1 not actually directed to the broad abstract idea issued here
03:10:23 2 and says is directed to something more particularized. On
03:10:26 3 that score in their briefing, Plaintiffs assert that the
03:10:29 4 claims are directed to "a specific architecture for
03:10:32 5 detecting and responding to new and constantly evolving
03:10:35 6 attacks on computer networks."

03:10:38 7 What is this more specific architecture that
03:10:41 8 Plaintiffs speak of? Essentially in places like Pages 3 to
03:10:44 9 6 of their answering brief or in Paragraph 27 of their
03:10:48 10 Complaint and, again, in oral argument here today,
03:10:50 11 Plaintiffs have focused most directly on three different
03:10:53 12 aspects of the claims.

03:10:54 13 First, they note that the claim systems and
03:10:56 14 methods utilize a "tiered analysis" at the probe. By this
03:11:01 15 they mean that first a probe uses "two different types of
03:11:05 16 filters" to assess status data, a positive and negative
03:11:10 17 filter that selects or discards data respectfully.

03:11:13 18 And, second, that the probe then separately
03:11:15 19 analyzes a middle ground type of data that has never been
03:11:18 20 selected or discarded -- that has neither been selected or
03:11:21 21 discarded by the filter, what the patents refer to as
03:11:24 22 post-filtering residue.

03:11:25 23 Second, Plaintiffs highlight that the claimed
03:11:28 24 systems and methods also use a "two-level review process"
03:11:32 25 and that a computerized analysis of this data occurs first

03:11:36 1 at the probe level. But then the information gleaned about
 03:11:39 2 potential security-related events is sent to a human analyst
 03:11:42 3 for further review.

03:11:43 4 And, third, Plaintiffs know that in certain
 03:11:45 5 dependent claims like Claim 14, they require that the
 03:11:48 6 analysis performed at the SOC involves electronic
 03:11:53 7 cross-probe correlation, which the Court understands to mean
 03:11:55 8 that, as Plaintiffs suggested in briefing, the system takes
 03:11:58 9 into account and analyzes status data obtained from multiple
 03:12:02 10 different probes, not just a single probe.

03:12:04 11 The directed to inquiry in step one applies a
 03:12:09 12 stage one filter to claims considered in light of the
 03:12:10 13 specification, based on whether their character as a whole
 03:12:14 14 or their focus is directed to exclude subject matter. As to
 03:12:17 15 how that inquiry should proceed, the Federal Circuit
 03:12:20 16 provides some guidance in *Internet Patents Corp. vs. Active*
 03:12:24 17 *Network, Inc.*

03:12:25 18 There, in order to ascertain at step one whether
 03:12:27 19 the claim's character as a whole was directed to an abstract
 03:12:30 20 idea, the Internet Patents Court examined the specification
 03:12:34 21 of the patent at issue. In doing so, it cited to what the
 03:12:36 22 patentee described in the specification as the "innovation
 03:12:40 23 over the prior art" and the "central, most important aspect"
 03:12:46 24 of the patent.

03:12:46 25 The Federal Circuit has also stated, however,

03:14:06 1 system first filters the status data, using a negative
 03:14:09 2 filter and subsystem and a positive filtering subsystem
 03:14:12 3 which selects "possibly interesting information" and
 03:14:16 4 forwards it on to the SOC.

03:14:17 5 Then, "data neither discarded by the negative
 03:14:20 6 filtering subsystem nor selected out as interesting by the
 03:14:24 7 positive filtering subsystem, form the residue, which is
 03:14:28 8 sent to anomaly engine 2050 for further analysis. Anomaly
 03:14:32 9 engine 2050 determines what residue information may be
 03:14:36 10 worthy of additional analysis and sends such information"
 03:14:39 11 for forwarding to the SOC.

03:14:41 12 And so far as the Court is aware, the only time
 03:14:43 13 the specification makes reference to the idea of cross-probe
 03:14:45 14 correlation comes in a few lines in Column 2 and Column 3.
 03:14:50 15 In Column 2, for example, the patent states that,
 03:14:53 16 "Furthermore, data filtering and analysis can include
 03:14:56 17 cross-product analysis, which allows the probe sentry system
 03:14:59 18 to correlate and recognize such multiple sensor readings as
 03:15:03 19 reflecting the same pattern. Such features ensure that the
 03:15:07 20 invention is capable of the rapid refinement necessary to
 03:15:10 21 combat inquiry attacks".

03:15:12 22 Additionally, there's a brief reference to
 03:15:14 23 "cross-correlation" and "cross-analysis" in Column 3 of the
 03:15:19 24 patent. But in general, the specification indicates that
 03:15:23 25 the patent's focus or its character as a whole is not really

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03:12:49 1 that reliance on the specification must always yield to the
 03:12:52 2 claim language in identifying what a claim is directed to,
 03:12:55 3 because the concern that derives the judicial exception to
 03:13:00 4 patentability is one of preemption. And the claim language
 03:13:03 5 defines the breadth of each claim.

03:13:05 6 In order to attack this step one question, then
 03:13:08 7 the Court needs to determine: What is the focus of
 03:13:11 8 representative Claims 8 and -- 18 and 14 of the '237 patent.
 03:13:16 9 In looking at the patent specification, it's pretty clear
 03:13:19 10 that some aspects of the specific architecture touted by
 03:13:23 11 Plaintiffs are not what the patent itself is saying it's
 03:13:26 12 particularly focused on.

03:13:27 13 For example, it's, of course, true that Claim 18
 03:13:30 14 and Claim 14 include reference to, first, how the probe
 03:13:34 15 separately analyzes post-filtering residue after the initial
 03:13:37 16 filtering stage has occurred.

03:13:39 17 And, second, the analysis of status data by way
 03:13:42 18 of cross-probe correlation.

03:13:44 19 But when one reads the patent, one sees that
 03:13:46 20 those post-filtering residue and cross-probe correlation
 03:13:50 21 concepts are actually little mentioned in the specification.
 03:13:53 22 For example, the only time the specification mentions the
 03:13:55 23 concept of analyzing post-filtering residue comes in
 03:13:58 24 Column 8. Therein a description of an exemplary embodiment
 03:14:03 25 found in Figure 2. The patent explains that after the

03:15:27 1 attuned to those two concepts where they're used in some
 03:15:27 2 accomodation.

03:15:31 3 Instead, the patent reads as if its focus is
 03:15:34 4 instead on the general concept of filtering and analyzing
 03:15:37 5 status data and doing so via the two-level review process
 03:15:40 6 that Plaintiffs spoke of in their briefing. In other words,
 03:15:44 7 having one computerized review process occur at the probe
 03:15:48 8 and then another human analyst based review process occur at
 03:15:51 9 the SOC.

03:15:52 10 That the patent's focus is on this two-level
 03:15:54 11 review process is seen first by looking at the abstract.
 03:15:57 12 There the patent explains that the inventions described
 03:16:00 13 therein are about how "a probe attached to a customer's
 03:16:03 14 network collects status data and other audit information
 03:16:07 15 from monitored components of the network looking for
 03:16:10 16 footprints or evidence of unauthorized intrusions or attack.
 03:16:13 17 The probe filters and analyzes the collected data to
 03:16:16 18 identify potentially security-related events happening on
 03:16:19 19 the network, identify events that are transmitted to human
 03:16:22 20 analysts" for problem resolution."

03:16:25 21 After discussing the types of resources that a
 03:16:27 22 human analyst might use, the abstract concludes by noting
 03:16:30 23 the feedback from the analyst: "Problem resolution evidence
 03:16:34 24 can be used to update the knowledge base available to
 03:16:36 25 analysts for future attacks and to update the filtering and

03:16:40 1 analysis capabilities of the probe in other systems."

03:16:43 2 There's no specific mention there of analyzing

03:16:46 3 post-filtering residue or the use of cross-probe

03:16:49 4 correlation, for example. So, too, in the patent's

03:16:52 5 Background of the Invention section. There, the patent

03:16:55 6 explains how hierachal computer and network security

03:16:58 7 products like firewalls for authentication mechanisms or

03:17:01 8 encryption were focused on preventing outside intrusion into

03:17:05 9 an internal network. But the patent explains that because

03:17:07 10 those computerized processes don't always work perfectly,

03:17:11 11 it's also helpful to have "monitoring detection and response

03:17:15 12 in the event of a breach."

03:17:17 13 That said, the patent explains that system

03:17:19 14 administrators cannot easily play its additional monitoring

03:17:23 15 role, and that they "normally do not have the time or

03:17:25 16 ability to read through large amounts of constantly updating

03:17:29 17 audit information looking for attacks on their systems."

03:17:32 18 "They also do not have the time to continuously

03:17:34 19 monitor hacker activities looking out for new tactics, tools

03:17:37 20 and trends."

03:17:38 21 "Finally, they don't have the time to become

03:17:40 22 experts on every kind of intrusion and to maintain that

03:17:43 23 expertise."

03:17:45 24 Therefore, here the patent concludes by noting

03:17:47 25 that what's needed is a system that both employs "automatic

03:17:52 1 defenses" that work against automated attacks, but that also

03:17:55 2 utilizes "human intelligence" and that "takes advantage of

03:18:00 3 security intelligence and other knowledgeable databases" in

03:18:04 4 order to provide "the kind of intelligent defense offered by

03:18:08 5 the present invention."

03:18:09 6 In other words, here the patent seems to be

03:18:11 7 saying that its focus is on providing the two-level review

03:18:14 8 process. One part computer based, one part human based that

03:18:18 9 Plaintiffs speak of.

03:18:20 10 This conclusion is also borne out in reviewing

03:18:23 11 The Summary of The Invention section of the patent. As the

03:18:25 12 Court's noted, there are a few brief references in Columns 2

03:18:27 13 and 3 in that section to the benefit of the systems taking

03:18:30 14 into account cross-probe correlation. But the entirety of

03:18:34 15 the rest of the section which spans Columns 2 through 4 is

03:18:37 16 really talking at a high level about the benefits of a

03:18:40 17 two-level system for intrusion detection, one that

03:18:42 18 incorporates the work of a probe or sentry system that

03:18:45 19 filters data and does a preliminary threaded analysis. And

03:18:48 20 one that also incorporates human analysts to further sift

03:18:52 21 through that data and provide feedback. And this section

03:18:54 22 doesn't mention specifically the particular benefit of

03:18:56 23 having the probe select out and then separately review

03:19:00 24 post-filtering residue even once.

03:19:02 25 So, this all begs the question: If the patent's

03:19:04 1 focused on the use of a two-level system for detecting

03:19:07 2 security threats, does that concept amount only to simply

03:19:11 3 "collecting, filtering, analyzing and transmitting data and

03:19:14 4 then making modifications based on human feedback?"

03:19:18 5 For our purposes here, and the Court will assume

03:19:21 6 arguably, yes. The Court will take this path because these

03:19:24 7 portions of the patent seem to be telling us that what the

03:19:26 8 claim is about is that having the computerized probe filter

03:19:30 9 status data and analyze it, and then later having a human do

03:19:33 10 a second-level set of analysis of certain data that's been

03:19:36 11 passed along.

03:19:38 12 There's nothing more in the claims about how the

03:19:40 13 probe or the human analyst must do that filtering analysis

03:19:42 14 or what type of feedback or modifications must be provided

03:19:46 15 by the analyst. Moreover, a way of assessing whether claims

03:19:50 16 directed to an abstract idea is to ask whether the claim is

03:19:53 17 directed to an improvement in computer functionality, or

03:19:56 18 instead, the computer is simply being used as tools to aid

03:19:59 19 in carrying out the abstract idea itself.

03:20:02 20 And here, there's no other indication in the

03:20:04 21 patent that either of these two high-level levels of review

03:20:07 22 of status data implemented improvement to the way that

03:20:11 23 computers work. For example, Plaintiffs don't contend that

03:20:13 24 the claim's use of computer-based positive and negative

03:20:16 25 filter or analysis in any way represents a new computerized

03:20:20 1 method of performing this type of work. Indeed, in

03:20:24 2 Column 8, the patent suggests that it's not.

03:20:26 3 Moreover, as was noted above in the Court's

03:20:28 4 discussion of Background of The Invention section of the

03:20:30 5 patent, the patent explains that the role of the human

03:20:33 6 analyst is to allow the claim system to engage in the type

03:20:36 7 of data analysis that a human can do, but the system

03:20:39 8 administrators simply don't have the time to do, since they

03:20:42 9 can't "read through large amounts of constantly updated

03:20:45 10 audit information."

03:20:47 11 As Defendant noted in its opening brief, this is

03:20:50 12 "not an improvement to computer functionality. It simply

03:20:53 13 supplements one human, the administrator, with another, an

03:20:56 14 analyst."

03:20:57 15 Now, the Court doesn't necessarily agree with

03:21:01 16 Defendant's contention that the patent is directed solely to

03:21:03 17 a "human solution not a technical solution." It would be

03:21:07 18 more accurate to say, with its focus on this two-level

03:21:10 19 review of status data, the patent's directed to the

03:21:13 20 combination of a human solution and a computer-based

03:21:17 21 solution. But when describing claiming this two-level

03:21:20 22 solution, it's as if the patent simply said that it was

03:21:23 23 claiming the following idea: Use a computer to filter and

03:21:26 24 analyze status data in a manner indistinguishable to how

03:21:31 25 computers already do this and then use a human to further

03:21:33 1 analyze status data and provide some feedback on it, nothing
 03:21:37 2 more.
 03:21:37 3 It's difficult to see how this combined concept
 03:21:40 4 that broadly, which simply seems to be about layering
 03:21:43 5 together two broad ways of collecting, filtering and
 03:21:47 6 analyzing data in order to provide feedback, is meaningfully
 03:21:50 7 different from the Defendants' articulation of the abstract
 03:21:53 8 idea. And so, the Court agrees, for our purposes here, that
 03:21:56 9 the claims are directed to the proffered abstract idea in
 03:22:01 10 Alice's step one.

03:22:02 11 I now turn to step two of the Alice framework.
 03:22:05 12 At step two, the Courts are required to assess what else is
 03:22:08 13 in the claim, beyond the abstract idea, in order to
 03:22:11 14 determine whether the additional elements in the claim,
 03:22:14 15 either viewed independently or as an ordered combination,
 03:22:17 16 transform the nature of the claim into a patent eligible
 03:22:20 17 application of the abstract idea.

03:22:22 18 With respect to computer functionality based
 03:22:27 19 claims, like those at issue here, the Federal Circuit has
 03:22:29 20 stated that such claims can include an inventive concept
 03:22:33 21 where they provide a technological solution to a
 03:22:36 22 technological problem.

03:22:38 23 At step two, for the role of the computer to be
 03:22:40 24 meaningful in the context of the Section 101 analysis, it
 03:22:43 25 must involve more than the performance of well-understood

03:23:55 1 components of the representative claims, were they standing
 03:23:58 2 alone, would amount to anything other than use of generic
 03:24:01 3 computer components to perform well-known computer
 03:24:04 4 functions.

03:24:05 5 Claim 18, for example, utilizes sensors, a
 03:24:07 6 secure operation center and at least one probe. But as the
 03:24:11 7 Defendant notes, the patent tells us at Column 4 that any
 03:24:14 8 such technology utilizing those claim elements, it was well
 03:24:17 9 known and commercially available. So, the use of these
 03:24:19 10 computer hardware based limitations in the claims do little
 03:24:22 11 more than spell out what it means to apply the abstract idea
 03:24:25 12 on a computer.

03:24:26 13 Moreover, Plaintiff's additional step of
 03:24:28 14 analyzing post-filtering residue appears to make use of,
 03:24:31 15 according to Column 8 of the patent, a type of well-known
 03:24:35 16 data discrimination analysis. And Claim 14's reference to
 03:24:39 17 the use of cross-probe correlation is not suggested on its
 03:24:42 18 own to be a new use of computer technology.

03:24:45 19 That said, we also note from the Federal
 03:24:47 20 Circuit's decision in *BASCOM* that the claim's use of an
 03:24:50 21 ordered combination of otherwise known conventional elements
 03:24:54 22 can still amount to an inventive concept in step two. And
 03:24:58 23 in the Court's view, there is just enough in the record to
 03:25:01 24 render it plausible that the representative claims included
 03:25:04 25 inventive concept by way of their use of an ordered

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03:22:45 1 routine and conventional activities previously known in the
 03:22:49 2 industry. I will say that I think the step two question
 03:22:52 3 here was a difficult one to resolve. Reasonable minds could
 03:22:55 4 disagree about how one should come out.

03:22:58 5 Let me explain, though, why I am determining
 03:23:00 6 that the record indicates the presence of a factual disputed
 03:23:04 7 step two sufficient to warrant denial of the Defendant's
 03:23:06 8 motion. At times in the briefing and in the Complaint, such
 03:23:10 9 as in Paragraph 29 of the Complaint, Plaintiffs note that
 03:23:15 10 claim systems and methods amounted to a "novel"
 03:23:17 11 architecture for unearthing and addressing network
 03:23:20 12 intrusions.

03:23:20 13 And the Court must accept those allegations of
 03:23:22 14 novelty as true at the pleading stage, but that alone
 03:23:25 15 wouldn't be enough to get Plaintiffs over the hump at
 03:23:28 16 step two. That's because there's a difference between the
 03:23:30 17 concept of novelty and patent eligibility in the patent.

03:23:34 18 The Federal Circuit's explained that whether a
 03:23:35 19 particular element or combination of elements is novel
 03:23:38 20 doesn't necessarily note whether that element's patent
 03:23:41 21 eligible.

03:23:42 22 Put differently, as the Federal Circuit stated
 03:23:43 23 in its *Synopsys, Inc. vs. Mentor Graphics*, a claim for a new
 03:23:49 24 abstract idea is still an abstract idea. Nor the Court's
 03:23:52 25 view is there any indication that any of the remaining

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03:25:07 1 combination of known elements in an unconventional way as
 03:25:11 2 part of the claim security system amendments.
 03:25:14 3 Here, it's the claim's combination of the
 03:25:17 4 two-level review process with the added more specific step
 03:25:21 5 of having the computer probe than additionally analyzed
 03:25:24 6 post-filtering residue. Plus, in at least some dependent
 03:25:29 7 claims, the computer's additional use of data obtained from
 03:25:31 8 multiple probes that could represent the requisite ordered
 03:25:35 9 combination of elements.

03:25:36 10 Of course, one might say, as Defendant does,
 03:25:39 11 that the claim's additional assessment of post-filtering
 03:25:42 12 residue or the correlation of status data from multiple
 03:25:45 13 probes is just another way of piling the use of one abstract
 03:25:48 14 idea on to another. In other words, one could argue that
 03:25:50 15 the second post-filtering residue analysis step is just
 03:25:54 16 another way of saying analyze data or that the cross-probe
 03:25:58 17 correlation step is just another way of saying correlate
 03:26:01 18 data, and that both of those things are just additional ways
 03:26:03 19 to make use of abstract ideas.

03:26:05 20 And one could also argue, as Defendant does,
 03:26:08 21 that claims do not tell us any more about how the claim
 03:26:11 22 systems or methods analyze post-filtering residue or how
 03:26:14 23 they correlate information from different probes, such that
 03:26:18 24 the addition of those other steps cannot provide an
 03:26:21 25 inventive concept.

03:26:22 1 And it's true, the claims don't provide this
 03:26:24 2 additional indication of how the systems or methods do this
 03:26:26 3 particular work. Moreover, they certainly don't describe
 03:26:28 4 some further technical means for performing these functions.
 03:26:33 5 But the Court is not completely convinced that the way
 03:26:36 6 Defendant is looking at these issues is the right way to do
 03:26:38 7 so for purposes of its review here.

03:26:41 8 A couple of cases from the Federal Circuit
 03:26:44 9 convince the Court that this is so. Particularly, one. And
 03:26:49 10 there the Court looks to the Federal Circuit's decision in
 03:26:51 11 *SRI International, Inc. vs. Cisco Systems, Inc.*, the case
 03:26:55 12 that Plaintiffs have identified as the most analogous
 03:26:58 13 Federal Circuit opinion to this case. The Court agrees with
 03:27:02 14 Plaintiffs that SRI, although it was decided at the step one
 03:27:05 15 stage not at step two, is very helpful to their argument
 03:27:08 16 here.

03:27:09 17 In SRI, the representative claim was to a
 03:27:11 18 computer-automated method of hierarchically event monitoring
 03:27:15 19 and analysis within a network. The claims preformed this
 03:27:18 20 method by, first, deploying more than one network monitor to
 03:27:22 21 detect suspicious activity based on analysis of at least one
 03:27:25 22 of certain categories of network trafficking.

03:27:28 23 Second, by having those monitors generate
 03:27:30 24 reports of suspicious activity.

03:27:32 25 And, third, by having those reports be received

03:28:49 1 computer networks themselves.
 03:28:51 2 The *SRI* Court came to this conclusion, even
 03:28:54 3 though the claim did not specify how the network monitors
 03:28:58 4 detected suspicious activity or analyzed data beyond the
 03:29:01 5 requirement that they use at least one of the categories
 03:29:04 6 that they had mentioned in the claim, or how they generated
 03:29:07 7 reports of suspicious activity, or how they received and
 03:29:12 8 integrated those reports.

03:29:12 9 Despite this, *SRI* concluded that the claims were
 03:29:15 10 directed to what is called a "specific technique"
 03:29:18 11 "utilizing" -- "using a plurality of network monitors that
 03:29:23 12 each analyzed specific types of data on the net and
 03:29:26 13 integrating reports from the monitors to solve a
 03:29:30 14 technological problem arising in computer networks,
 03:29:33 15 identifying hackers or potential intruders to the network."

03:29:37 16 Now, unlike in *SRI*, as I've noted above, the
 03:29:39 17 patent specification doesn't say a lot about the claim's
 03:29:43 18 additional use of the probes to analyze post-filtering
 03:29:46 19 residue or the claim's use of data for multiple probes and
 03:29:49 20 how, when combined with the two-level filtering analysis
 03:29:53 21 process, this might amount to an unconventional use of
 03:29:56 22 computer technology.

03:29:57 23 And as the Court mentioned, there are some
 03:29:59 24 references in the specification to these additional concepts
 03:30:02 25 in Columns 2, 3 and 8, but they're certainly not highlighted

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03:27:34 1 or integrated by one or more of the monitors.
 03:27:38 2 At step one, the SRI Court found that the claim
 03:27:40 3 was not simply directed to the abstract idea of collecting
 03:27:43 4 and analyzing data. This was even though the steps of the
 03:27:46 5 claims were fairly basic and functional in the requirements
 03:27:50 6 in that one aspect of it simply required an analysis of
 03:27:53 7 network trafficking. And another simply required that the
 03:27:56 8 monitors "generate reports."

03:27:58 9 And a third only said that the monitors must be
 03:28:01 10 "receiving and integrating reports," nothing more. Yet, the
 03:28:05 11 SRI Court didn't conclude that this method, the claims were
 03:28:08 12 simply about collecting and analyzing data. Instead, in
 03:28:12 13 determining that the claims, nevertheless, were directed to
 03:28:15 14 something more, the Court looked at the patent
 03:28:17 15 specification. The specification explained that the claimed
 03:28:20 16 invention solved weaknesses in conventional networks in
 03:28:23 17 order to fix a technological problem and provide a
 03:28:27 18 "framework for the recognition of more global threats,
 03:28:31 19 inter-domain connectivity, including coordinated attempts to
 03:28:35 20 infiltrate or destroy connectivity across an entire
 03:28:36 21 network."

03:28:38 22 This was enough to ensure the Court that the
 03:28:40 23 computers used in the claim were not added simply "as a
 03:28:43 24 tool" to automate conventional activity, but instead were
 03:28:46 25 claims that improved the functionality of the computers and

03:30:05 1 or described in a really fulsome manner. That said, the
 03:30:09 2 Complaint does fill in some of these blanks.
 03:30:11 3 Paragraph 38 of the Complaint is particularly
 03:30:12 4 relevant. Therein, Plaintiffs state that the architecture
 03:30:16 5 of the patent was "novel and unconventional." And in
 03:30:19 6 explaining why that was so, they cite to the examiner's
 03:30:22 7 Notice of Allowability regarding the '237 patent. Therein,
 03:30:25 8 the examiner stated that, Typically network security systems
 03:30:29 9 "all data is filtered by intrusion detection, firewall,
 03:30:33 10 gateway, proxy, sensor, probe, or sentry or some other type
 03:30:36 11 of device," such that if "an attack occurs, the data is
 03:30:40 12 transmitted for further analysis."
 03:30:43 13 The examiner noted that in such systems "all
 03:30:45 14 other data is usually blocked or discarded." The Notice of
 03:30:51 15 Allowability also states that "prior art does not disclose
 03:30:53 16 or suggest data to be either discarded by a negative or
 03:30:56 17 positive is the residue that is sent for further analysis."
 03:31:00 18 The Court understands this to be an indication that while it
 03:31:02 19 was conventional for intrusion detection systems to use a
 03:31:07 20 filtering system like that described in the claims -- that
 03:31:09 21 is, one that filters status data into positive or negative
 03:31:15 22 categories to be either further reviewed, because it's known
 03:31:17 23 to be threatening or otherwise discarded -- those systems
 03:31:20 24 were not using probes to then additionally further analyze
 03:31:23 25 data that fell somewhere in between those two poles or what

03:31:27 1 the patents here describe as "residue" data.
 03:31:29 2 Additionally, Paragraph 38 of the Complaint
 03:31:31 3 states that the computer-based use of and correlation of
 03:31:34 4 data from different probes was also "a significant
 03:31:38 5 improvement to existing computer security technology at the
 03:31:41 6 time." In that, "previous conventional security systems
 03:31:45 7 were constrained to pattern matching at a single point in
 03:31:49 8 the network."

03:31:50 9 So, as in *SR/*, here the record provides at least
 03:31:53 10 some, not a lot, but at least some factual support for the
 03:31:58 11 idea that the claims could contain a specific solution to a
 03:32:02 12 problem faced in the computer's network security field, and
 03:32:05 13 that the solution is at least significant, though not
 03:32:08 14 exclusively, rooted in computer technology.

03:32:12 15 That so, as in *SR/*, even though the claims don't
 03:32:16 16 specify every detail of how the claimed systems in the
 03:32:20 17 patents protect against network intrusion. And as in *SR/*,
 03:32:23 18 even though the claims looked at one mode, it might be said
 03:32:26 19 to simply be about collecting, and filtering and analyzing
 03:32:30 20 data. It seems like that may not be the right way to view
 03:32:35 21 it at step two. Instead, it seems like the claims could be,
 03:32:37 22 maybe should be viewed, at least at the pleading stage, as
 03:32:41 23 plausibly employing a "specific technique" to assess status
 03:32:45 24 data, one that utilizes a partly computerized, two-level
 03:32:49 25 filtering system and uses the computerized probe to

03:34:05 1 I'm not saying that a better record on this
 03:34:07 2 issue in and of itself would make the difference in
 03:34:10 3 Defendant's favor in a case dispositive stage of the case.
 03:34:13 4 All I'm saying is that if it were, that stage would be the
 03:34:16 5 right stage to fully assess the record on that issue, not
 03:34:18 6 the pleadings stage.
 03:34:20 7 In addition to *SR/*, the representative claims
 03:34:24 8 here also don't seem all that different to the Court than
 03:34:27 9 the claims at issue in *Thales Visionix Inc. vs. United*
 03:34:32 10 *States*, another Federal Circuit case. Claim 22 in *Thales*
 03:34:35 11 was exemplary and it was briefed. In two lines, it recited
 03:34:38 12 a method of determining an object's orientation based on the
 03:34:42 13 outputs of two inertial sensors that were mounted
 03:34:45 14 respectively on the objects and moving reference point.
 03:34:49 15 The specification explained how conventional
 03:34:51 16 methods retracting an object's motion were flawed, and that
 03:34:56 17 the patent's invention provided multiple advantages,
 03:34:59 18 including increased accuracy, the ability to operate without
 03:35:02 19 requiring hardware and simple installation.
 03:35:04 20 And in finding of step one, the claim and
 03:35:06 21 another representative claim were not directed to the
 03:35:08 22 abstract idea of using laws of nature governing motion to
 03:35:13 23 track two objects. The Federal Circuit noted that, instead,
 03:35:16 24 the "claims specify a particular configuration of inertial
 03:35:20 25 sensors and a particular method of using the raw data from

03:32:52 1 additionally assess residue data in combination with that
 03:32:55 2 two-level system in a way that wasn't being done before.
 03:32:58 3 And that, also, in some dependent claims makes use of data
 03:33:03 4 for multiple probes in a way that computerized programs
 03:33:06 5 weren't doing.

03:33:06 6 One last point about *SR/*. Defendant knows that
 03:33:10 7 one of the justifications, though not the only one that the
 03:33:13 8 Federal Circuit used in that case to support its decision,
 03:33:16 9 was that the Court tended to agree with the Plaintiff that
 03:33:19 10 "the human mind is not equipped to detect suspicious
 03:33:22 11 activity by using network monitors and analyzing network
 03:33:26 12 packets as recited by the claims."

03:33:28 13 And Defendant contrasts that with the scenario
 03:33:31 14 here, arguing that it is clear from the record that the
 03:33:33 15 human mind is equipped to do everything that Claim 18 can do
 03:33:37 16 in a similar way that a non-human could do. Obviously, some
 03:33:41 17 elements of Claim 18 do involve a human analyst, so it seems
 03:33:45 18 hard to dispute Defendant's contention as to those elements.
 03:33:48 19 But the claim does have other elements such as the probe's
 03:33:50 20 use of positive and negative filtering.

03:33:53 21 Now, it may be the case that a human could play
 03:33:55 22 that filtering role in a similar way to what the probe does
 03:33:57 23 here, but I don't have a great record to support that
 03:34:00 24 assertion. And I can't wholly rely on the arguments of
 03:34:03 25 counsel on that point.

03:35:23 1 the sensors in order to more accurately calculate the
 03:35:26 2 position and orientation of an object on a moving platform."
 03:35:31 3 Now, the Federal Circuit said this even though
 03:35:33 4 like here, Claim 22 did not specify how to determine the
 03:35:37 5 orientation of the object or what process or formulas were
 03:35:40 6 used to do that. The claim just said that the use of "based
 03:35:44 7 on" signals from their respective two sensors. Nor do the
 03:35:48 8 claims say how those sensors work to provide signals.
 03:35:52 9 And the sensors used in *Thales*, like the probes
 03:35:54 10 and sensors used here, were conventional in the art.
 03:35:58 11 Nevertheless, it was enough for the Federal Circuit that the
 03:36:00 12 configurations of the sensors was a "particular" one. It
 03:36:03 13 was used in a "particular method" for collecting data.
 03:36:08 14 In other words, sufficient particularity was
 03:36:10 15 demonstrated by the fact that the sensors were specified to
 03:36:12 16 be placed in two different positions, an object and a moving
 03:36:16 17 reference frame, so long as the patent or the record helped
 03:36:19 18 make clear how that particular arrangement solved the
 03:36:22 19 technological problem. Similarly, here, it's at least
 03:36:25 20 plausible that the claims at issue contain a similar level
 03:36:27 21 of particularity, and that a probe is used to do positive
 03:36:31 22 and negative filtering, and then is used a second time to
 03:36:34 23 assess residual status in it. And then in certain claims
 03:36:37 24 data from multiple purposes is utilized.
 03:36:39 25 As noted above, the record contains indication

03:36:42 1 in support of combination of steps taken together with the
 03:36:44 2 rest of the elements of the claims at issue, amounted to
 03:36:47 3 unconventional ways to use computerized probes in order to
 03:36:50 4 solve a problem in computer securities.

03:36:52 5 Lastly, the Court knows that the Supreme Court
 03:36:56 6 has stated the eligibility analysis is driven by the concern
 03:36:59 7 of preemption. The preemption analysis in turn compels a
 03:37:03 8 Court to assess whether the claims at issue attempt to
 03:37:06 9 preempt every application or at least a great many
 03:37:10 10 applications of the abstract at issue.

03:37:13 11 And, here, in the Court's view, the record
 03:37:15 12 provides at least some indication that the claims don't
 03:37:17 13 preempt all of this and perhaps don't even preempt very many
 03:37:21 14 of these of "collecting, filtering, analyzing and
 03:37:24 15 transmitting data and then making modifications based on
 03:37:27 16 human feedback."

03:37:28 17 Paragraph 38 in the Complaint tells us that one
 03:37:31 18 could simply collect and analyze status data by simply using
 03:37:34 19 a positive and negative filter without, also, as the claims
 03:37:37 20 do, then using the probe again to reassess residual data
 03:37:40 21 that didn't fall into the positive or negative categories of
 03:37:44 22 the first filtering stage.

03:37:45 23 And it also tells us that one could collect,
 03:37:47 24 filter and analyze data only by using one probe instead of,
 03:37:50 25 as in certain dependent claims here, by obtaining and

03:39:14 1 relate to Section 101 for the reasons I'll set out herein.
 03:39:18 2 Plaintiff asserts in its Complaint in the
 03:39:22 3 Emotive case that Defendant infringes at least independent
 03:39:24 4 Claim 1 of the United States Patent Number 11,416,887, which
 03:39:28 5 I'll refer to as the '887 patent, and independent Claim 15
 03:39:32 6 of United States Patent Number 11,416,897, which I'll refer
 03:39:36 7 to as the '897 patent.

03:39:38 8 In the Postscript case, Plaintiff asserts that
 03:39:41 9 Defendant infringes at least those two claims, as well as
 03:39:44 10 independent Claim 23 of the United States Patent Number
 03:39:47 11 11,553,074 or the '074 patent. The three asserted patents
 03:39:52 12 share the same title, same inventors and nearly identical
 03:39:55 13 specification.

03:39:56 14 In their briefing, both Defendants agree that
 03:39:58 15 the respective asserted independent claims call out or
 03:40:01 16 respective Complaints are representative of each other and
 03:40:04 17 of all asserted claims for Section 101 purposes. And so,
 03:40:07 18 they treated those claims interchangeably throughout their
 03:40:10 19 arguments in the briefs.

03:40:12 20 For its part, Plaintiff took issue in its
 03:40:13 21 briefing with the idea that these three claims might be
 03:40:16 22 representative of all the claims in the patents for
 03:40:19 23 Section 101 purposes. But aside from the brief mention that
 03:40:23 24 the content of a few dependent claims of the '887 patent in
 03:40:26 25 its answering brief in the Postscript case, Plaintiff didn't

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03:37:54 1 correlating information from multiple probes. The extent to
 03:37:57 2 which the claims do not preempt the field of the abstract
 03:38:00 3 idea is a fact question, not inevitable to resolution at the
 03:38:03 4 Rule 12 stage, at least based on this record.

03:38:06 5 So, for all these reasons, the Court denies
 03:38:10 6 Defendant's motion at step two of the *Alice* analysis without
 03:38:13 7 prejudice to Defendant's ability to re-raise the issue at
 03:38:16 8 the case dispositive motion stage.

03:38:18 9 Okay. I'll now move on to the second and third
 03:38:27 10 cases which are related. Attentive Mobile, Inc. is the
 03:38:30 11 Plaintiff in both cases. And in Civil Action 22-1163-CJB,
 03:38:34 12 the Defendant is 317 Labs, Inc., doing business as Emotive.
 03:38:38 13 I'll refer to the Defendant there as Emotive and to the case
 03:38:42 14 as the Emotive case.

03:38:43 15 And in Civil Action Number 23-87-CJB, the
 03:38:47 16 Defendant is Stodge, Inc. doing business as Postscript.
 03:38:50 17 I'll refer to that Defendant as Postscript and to the case
 03:38:53 18 as the Postscript case.

03:38:55 19 In these cases, we have Defendants' Rule
 03:38:56 20 12(b)(6) motions. Most of, though not all of the motions in
 03:38:59 21 the Emotive case and the entirety of the motion in the
 03:39:02 22 Postscript case is premised on the ground that the operative
 03:39:05 23 Complaint should be dismissed on a Section 101 eligibility
 03:39:08 24 basis. The Court will address only those Section 101
 03:39:11 25 grounds for dismissal now and will deny the motions as they

03:40:28 1 really make a meaningful argument as to the distinctiveness
 03:40:31 2 of the dependent claims.

03:40:34 3 In any event, for ease of reference, the Court
 03:40:36 4 will focus on Claim 1 of the '887 patent in rendering its
 03:40:40 5 decision today. The Court need not trouble itself further
 03:40:43 6 with the question of whether this claim is representative of
 03:40:45 7 all the asserted claims in the case. That's because since
 03:40:49 8 the Defendant's motion rose and fell with its arguments
 03:40:50 9 about three listed independent claims, and since the Court
 03:40:54 10 is concluding here that Claim 1 and those other two listed
 03:40:57 11 claims are not claims to an abstract idea, the Court is
 03:41:00 12 necessarily finding that the motions should be dismissed as
 03:41:03 13 to all asserted claims of the patents.

03:41:05 14 One other procedural note before I begin with
 03:41:08 15 the *Alice* two-step analysis. In the briefing at least,
 03:41:11 16 certain parties, particularly Emotive, appeared to cite to
 03:41:14 17 at least some materials that may not have been referenced in
 03:41:16 18 the Complaint in the case, or attached to the Complaint or
 03:41:20 19 integral to the Complaint. To the extent they did so, the
 03:41:24 20 Court knows that I cannot take such material into account in
 03:41:26 21 resolving the motion to dismiss, and so I will not do so
 03:41:29 22 here.

03:41:29 23 I'll now turn to the *Alice* analysis at step one.

03:41:32 24 At this step, the two Defendants have similar, though
 03:41:35 25 slightly different articulations of the abstract idea that

03:41:38 1 Claim 1 is purportedly directed to. Emotive framed its
 03:41:42 2 abstract idea a few different ways in the briefing, but the
 03:41:45 3 articulation that's probably most faithful to its briefing
 03:41:48 4 is "providing a streamline process to sign up for marketing
 03:41:52 5 promotions or services."

03:41:54 6 Postscript, for its part, asserts that the
 03:41:56 7 abstract idea at issue is "streamlining the process for a
 03:42:00 8 customer to enroll in a marketing promotion by providing a
 03:42:03 9 pre-filled and pre-addressed request."

03:42:05 10 In other words, Postscript's asserted abstract
 03:42:08 11 idea is a bit narrower than Emotive's is in that Postscript
 03:42:12 12 is allowing the method of streamlining issue must be
 03:42:14 13 accomplished via the use of a pre-filled and pre-addressed
 03:42:17 14 request. But overall the two asserted abstract ideas at
 03:42:20 15 issue are fairly similar.

03:42:22 16 For ease of reference today, the Court will
 03:42:23 17 utilize Postscript's abstract idea when discussing these
 03:42:27 18 issues and will assume, for the sake of argument, that both
 03:42:30 19 Defendants were pointing to that articulation as the concept
 03:42:32 20 that the claims are directed to.

03:42:34 21 I note that in doing so, I'm essentially doing
 03:42:36 22 Emotive a favor, because the proposed abstract idea is even
 03:42:39 23 broader than Postscript's. And so, it would suffer from
 03:42:42 24 even worse step one problems of the type I'm about to
 03:42:45 25 describe when analyzing the abstract idea that Postscript

03:44:09 1 resource identifier or URI, which is the type of link to the
 03:44:14 2 mobile device." This URI is described as "deeplink to a
 03:44:18 3 messaging application different from the first application."
 03:44:22 4 The claim goes on to explain that once the
 03:44:24 5 mobile device detects the user interacting with a
 03:44:28 6 "promotional message associated with the web page" that the
 03:44:31 7 URI causes the mobile device to "automatically transition
 03:44:35 8 from the first application to the messaging application" and
 03:44:39 9 "automatically populate a custom message in the messaging
 03:44:43 10 application that includes an address associated with the
 03:44:45 11 click detect server and a message product that includes an
 03:44:48 12 identifier associated with at least one of the web page or
 03:44:52 13 the user data."

03:44:53 14 The claim goes on to explain that once the
 03:44:57 15 mobile device detects that the user has hit the send button
 03:44:59 16 of the messaging, then the mobile device "sends the custom
 03:45:02 17 message to the click-to-text server."

03:45:05 18 Third, the click detect server receives the
 03:45:09 19 custom message.

03:45:10 20 Fourth, the server then enrolls the mobile
 03:45:11 21 device in a promotion associated with the promotional
 03:45:14 22 message that the user accessed on the web page.

03:45:17 23 An embodiment of how this process works is seen
 03:45:21 24 in Figures 2A to C of the patents. Those figures depict a
 03:45:25 25 user's mobile phone wherein the user is looking at a web

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03:42:48 1 says it is directed to.

03:42:50 2 So, the next question is: Is streamlining a
 03:42:52 3 process for a customer to enroll in a marketing promotion by
 03:42:56 4 providing a pre-filled and pre-addressed request an abstract
 03:43:00 5 idea? Here, there's no dispute that it is. And in its
 03:43:03 6 briefing, Plaintiff essentially acknowledges that this "bare
 03:43:07 7 idea may be abstract," but goes on to argue that Claim 1 is
 03:43:11 8 not, in fact, directed to that.

03:43:13 9 Instead, Plaintiff argues that the claim is
 03:43:15 10 directed to a specific "improved mobile sign-up system that
 03:43:20 11 merely involves this idea." With that understood, the Court
 03:43:23 12 next must assess whether Claim 1 is actually directed to the
 03:43:27 13 abstract idea at issue. To do that, we need to understand
 03:43:30 14 the claim and what it covers.

03:43:33 15 Claim 1 is a claim to a "non-transitory process
 03:43:37 16 or readable mean storing code" that causes a "click-to-text
 03:43:42 17 server" to do the following. First, send to a client server
 03:43:46 18 an integration tag that is "configured to be served with a
 03:43:50 19 web page" posted by that client server.

03:43:54 20 The integration tag causes any mobile device
 03:43:56 21 that hosts that web page via first application to send user
 03:43:59 22 data to either the client server or the click-to-text
 03:44:03 23 server.

03:44:03 24 Second, once the mobile device executes the
 03:44:05 25 integration, the click detect server sends "a uniform

03:45:28 1 page and clicking on a promotional link on the web page.
 03:45:31 2 Once the user does so, the mobile device automatically
 03:45:34 3 transitions from the web page to a messaging app.

03:45:37 4 In the messaging app, the text message computer
 03:45:39 5 that's been automatically populated with text asking the
 03:45:42 6 companies to subscribe the user to the product service and
 03:45:45 7 with the advertising company's phone number listed as the
 03:45:47 8 location where the message will be sent.

03:45:49 9 And the figures demonstrate how by hitting the
 03:45:53 10 send button on the messaging app, the user can send a
 03:45:55 11 message. It is then enrolled in or subscribed to the
 03:45:57 12 service.

03:46:01 13 Understanding what's claimed in Claim 1, we now
 03:46:04 14 have to determine what that claim is directed to. As I've
 03:46:06 15 explained earlier, the Federal Circuit requires that the
 03:46:09 16 Court examine the patents, particularly the patent
 03:46:11 17 specification, to assess what is the focus of the claim or
 03:46:16 18 what is its character as a whole. Is the claim's focus or
 03:46:21 19 character as a whole simply about the general concept of
 03:46:25 20 "streamlining the process for a customer to enroll in a
 03:46:28 21 marketing promotion by providing a pre-filled and
 03:46:31 22 pre-addressed request" or is it about something more than
 03:46:34 23 that or different than that?

03:46:37 24 In engaging in the step one inquiry, here the
 03:46:39 25 Court is particularly mindful of the guidance from the

03:46:41 1 Federal Circuit. In cases like *McRO, Inc. vs. Bandai Namco Games America*. In *McRO*, the Federal Circuit instructed
 03:46:46 2 Courts to be careful to avoid oversimplifying claims by
 03:46:49 3 looking at them generally and failing to account for the
 03:46:53 4 specific requirements found therein.

03:46:58 6 In the Court's view, that is what Defendants
 03:47:01 7 have done by way of their assertions that the claims are
 03:47:03 8 only directed to the abstract idea at issue. The Court
 03:47:08 9 comes to this conclusion because the patent specification
 03:47:10 10 tells us time and time again in many different ways that how
 03:47:15 11 everyone might articulate what Claim 1 is directed to, that
 03:47:18 12 concept needs to take into account the fact that the claim
 03:47:22 13 makes use of what the patent refers to as a custom-generated
 03:47:26 14 deeplinking process.

03:47:28 15 More specifically, what's key to the patent is
 03:47:31 16 that in response to a user clicking on a website's
 03:47:33 17 promotional advertising and using a first application, a URI
 03:47:37 18 generated by the claim's click-to-text server then deep
 03:47:41 19 links to a second messaging application in which a custom
 03:47:44 20 enrollment message with data related to that user or the
 03:47:47 21 website that the user visited is automatically populated to
 03:47:51 22 the messaging. And this concept is central to the focus of
 03:47:55 23 Claim 1 is evident from many parts of the patents. Of
 03:47:59 24 course, the concept is found in text in Claim 1 itself, but
 03:48:03 25 it's also highlighted consistently in various other parts of

03:49:21 1 not dispute that the concept that deeplinking was known in
 03:49:23 2 the art at the time of the patents. Indeed, this seems to
 03:49:27 3 be indicated in Column 3 of the patent.
 03:49:28 4 Where else does the patent indicate that the
 03:49:32 5 concept of custom-generated deeplinking is central to what
 03:49:35 6 Claim 1 is about? Well, the abstract tells us this. It
 03:49:39 7 prominently notes that the claims involve a response to user
 03:49:42 8 input sending an HTT response message, including the "URI of
 03:49:46 9 the second user interface and the purchase information to
 03:49:50 10 deeplink to the second user interface, and to cause the
 03:49:53 11 second user interface to be rendered at the mobile device
 03:49:55 12 with the purchase information pre-populated in an input
 03:49:59 13 field in the text messaging. This description makes up half
 03:50:03 14 of the abstract's text.

03:50:05 15 The summary section of the patent also indicates
 03:50:07 16 the prominence of what's called a custom-generated deeplink.
 03:50:11 17 A good portion of its text, which runs for about 40 lines,
 03:50:15 18 are just about the same process of sending a URI purchase
 03:50:18 19 information to deeplink to the second user interface and to
 03:50:21 20 cause a pre-populated text message, including user data or
 03:50:25 21 website data to be generated.
 03:50:27 22 And if there was any doubt remaining about
 03:50:29 23 whether Claim 1 was directed to a concept that has to
 03:50:32 24 include some reference to custom-generated deeplink, it
 03:50:34 25 comes in the background section of the patent at Column 1.

03:48:06 1 the patent as well.
 03:48:07 2 To start, just look at the patent's title. That
 03:48:10 3 title is "Methods and Apparatuses for Mobile Device
 03:48:10 4 Messaging-Based Communications Using Custom-Generated
 03:48:18 5 Deeplinks and Based on the Hypertext Transfer Protocol,
 03:48:21 6 HTTP."

03:48:23 7 The title makes clear that the patent's claims
 03:48:25 8 are not simply broadly about the concept of streamlining a
 03:48:29 9 customer's enrollment process by providing a pre-filled and
 03:48:32 10 pre-addressed request in any old way one wishes to.
 03:48:36 11 Instead, they're about doing so in a more particular way,
 03:48:39 12 one that must make use of what the patent refers to in
 03:48:42 13 shorthand as custom-generated deep links.

03:48:45 14 Before going further, let's understand what is
 03:48:48 15 deeplink or a deeplink associated with a URI. In Column 3,
 03:48:52 16 the specification describes deeplinking as a type of link
 03:48:55 17 used in mobile applications that allows the linking of one
 03:48:59 18 mobile application to another mobile application. And it
 03:49:02 19 explains that deeplinking can use a URI that links to a
 03:49:05 20 mobile application or to a specific location within a mobile
 03:49:08 21 application.

03:49:09 22 So, in other words, using a URI will accomplish
 03:49:12 23 deeplinking is a method of using computer technology to
 03:49:14 24 automatically transition from one mobile to another. I
 03:49:17 25 should also note that Defendants assert and Plaintiff does

03:50:37 1 There, the patentees are explaining what is the problem that
 03:50:40 2 the invention hopes to solve and how it intends to do so.
 03:50:43 3 The patent notes that known computer methods
 03:50:46 4 allow a mobile device user to be able to open a vendor's app
 03:50:50 5 or vendor's website in order to select a product for
 03:50:53 6 service, a field in which the user could provide payment
 03:50:56 7 information in order to complete a transaction. But the
 03:50:58 8 patents explain that with these known methods, the user
 03:51:01 9 often had to pause the server's previous activities such as
 03:51:03 10 viewing a website or reading an email on the mobile device
 03:51:06 11 because the computer automatically redirected them to the
 03:51:09 12 vendor's app or website. When the user got there, signing
 03:51:13 13 up for the product or services often required lots of user
 03:51:16 14 input, such as many different clicks of screen tips in order
 03:51:19 15 to complete the transaction.

03:51:21 16 The patent explains that this "time consuming
 03:51:23 17 and burdensome process results in many users leaving the
 03:51:26 18 purchase before the transaction is completed." And
 03:51:29 19 Plaintiff's complaints also add that sometimes users would
 03:51:32 20 fail to complete these purchases, not just due to lost
 03:51:35 21 interest, but also due to too many mistyped numbers.

03:51:39 22 Accordingly, in the Background Section of the
 03:51:41 23 patents, the patent even concludes by stating that, "A need
 03:51:43 24 exists for methods and apparatus for dynamic application
 03:51:47 25 deeplink to transition from one user interface to another

03:51:50 1 user interface at a mobile device for continuing and
 03:51:53 2 improved user experience and engagement when interacting
 03:51:56 3 with the mobile device."

03:51:57 4 So, sure, the claims certainly involve the
 03:52:00 5 concept of "streamlining a process for a customer to enroll
 03:52:04 6 in a marketing promotion by providing pre-filled and
 03:52:08 7 pre-addressed requests." But as the Federal Circuit
 03:52:10 8 explained in *Enfish LLC vs. Microsoft Corp.*, the step one
 03:52:14 9 inquiry "cannot simply ask whether the claims involve a
 03:52:18 10 patent eligible concept because essentially every routinely
 03:52:21 11 patent eligible claim" does so at some level.

03:52:24 12 For that reason, in *Enfish* the Federal Circuit
 03:52:28 13 cautioned District Courts not to "describe the claims at
 03:52:31 14 such a high level of extraction" so that the description is
 03:52:35 15 "untethered from the language of the claims" in a way that
 03:52:39 16 "all but ensures the exceptions to Section 101 follow the
 03:52:42 17 rule."

03:52:43 18 In the Court's view, that's what Defendants have
 03:52:46 19 done here. They've identified an abstract concept that
 03:52:49 20 Claim 1 involves, not the concept that Claim 1 is directed
 03:52:52 21 to.

03:52:53 22 Another way to understand that this is what's
 03:52:55 23 going on here is by realizing that there truly are many
 03:52:59 24 possible ways of streamlining the process for customer
 03:53:02 25 enrollment in a marketing promotion by providing the

03:54:15 1 then a screen pops up that asks if the user would like their
 03:54:18 2 personal information auto-filled into the request.
 03:54:22 3 In asserting that all Claim 1 is directed to is
 03:54:24 4 streamlining the process for a customer to enroll in a
 03:54:27 5 marketing promotion by providing a pre-filled and
 03:54:30 6 pre-addressed request, Defendants are essentially suggesting
 03:54:33 7 that the patent's really directed to a general concept that
 03:54:36 8 would cover any and all of these solutions or others.

03:54:40 9 And, obviously, for the reasons the Court has
 03:54:42 10 set out previously, that's just not so. The particular way
 03:54:46 11 that Claim 1 goes about providing a pre-filled and
 03:54:49 12 pre-addressed request, that is by utilizing a process that
 03:54:52 13 obtains user data via integration tags embedded in websites
 03:54:56 14 and employing a URI that deep links from one mobile app to
 03:55:00 15 another message app, and where the message app's
 03:55:02 16 automatically populated by a text message that contains user
 03:55:05 17 information or web page information.

03:55:08 18 That's not an afterthought in the claim.
 03:55:10 19 Instead, it's the start of the claim.
 03:55:13 20 Now, it is understandable why the Defendant in
 03:55:17 21 these issues might not want to include the concept of
 03:55:19 22 custom-generated deeplinking in its assertion about what
 03:55:22 23 Claim 1 is directed to, even though it seems like every part
 03:55:25 24 of the patent is telling us that that concept surely is a
 03:55:27 25 part of the patent's focus. After all, the more that the

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03:53:04 1 customer with a pre-filled and pre-addressed request, that
 03:53:07 2 the patents are surely not directed to or about all of them.
 03:53:11 3 For example, Defendants discuss some of those
 03:53:13 4 possible ways in their briefing. One of which doesn't even
 03:53:15 5 require the use of computer technology. On this, the
 03:53:19 6 Defendants note that for years magazines would include
 03:53:21 7 pre-populated forms with a mailing address, pre-typed
 03:53:24 8 message stating that the sender wishes to subscribe to a
 03:53:28 9 magazine and prepaid postage. All the customer would have
 03:53:30 10 to do to subscribe is to send that pre-filled, pre-addressed
 03:53:33 11 request.

03:53:33 12 And one can surely posit many other ways, even
 03:53:37 13 many other computerized ways of streamlining a customer's
 03:53:40 14 enrollment process by providing the customer with a
 03:53:42 15 pre-filled and pre-addressed request that don't involve the
 03:53:45 16 claim solution. Perhaps, a company, for example, could send
 03:53:49 17 an email to a customer that includes a pre-filled,
 03:53:52 18 pre-addressed enrollment form attached such that all the
 03:53:55 19 customer needs to do is print out the attachment and send
 03:53:58 20 the form away in U.S. mail to the company, or a company
 03:54:01 21 could enable a user to download an app, and it could click
 03:54:04 22 on a promotional request, which would generate a pop-up
 03:54:07 23 screen that the user saw that was pre-populated with the
 03:54:09 24 user's information. Or the user might click a promotional
 03:54:12 25 link on a web page that takes the user to a request, and

03:55:30 1 purported abstract idea sounds like it includes reference to
 03:55:33 2 a particular type of computer technology that generates a
 03:55:37 3 particular type of custom tech message, the more that
 03:55:40 4 concept starts to sound like it's not an abstract idea at
 03:55:43 5 all. And, certainly, not a longstanding commercial practice
 03:55:46 6 that people have been engaging in for generations. Instead,
 03:55:49 7 the concept will start to sound a lot more like a particular
 03:55:52 8 real-world application of an abstract idea.

03:55:55 9 The Court also notes that in their supplemental
 03:55:58 10 briefing, both Defendants cited *Customedia Technologies LLC*
 03:56:02 11 *vs. Dish Network Corp.* as the most analogous Federal Circuit
 03:56:04 12 case on point. Now, neither Defendant actually cited the
 03:56:09 13 *Customedia* in their opening briefs, which is surprising
 03:56:11 14 considering Defendants now count the case as the most
 03:56:15 15 impactful case in support of their arguments.

03:56:17 16 As a result of this, unfortunately, the
 03:56:18 17 Plaintiff never got a chance to brief its thoughts about why
 03:56:20 18 that case was on point. That said, though, the Court will
 03:56:23 19 address *Customedia* here.

03:56:25 20 The representative claim in *Customedia* was to a
 03:56:28 21 data delivery system for providing automatically delivery
 03:56:31 22 of multimedia products. The claim did so by using a "remote
 03:56:35 23 and counter transaction server for providing multimedia data
 03:56:38 24 products on a user" where at least one of those products was
 03:56:41 25 "specifically identified advertising data."

03:56:45 1 Additionally, the claim employed a "programmable
 03:56:49 2 local receiver unit" that received the data products. That
 03:56:53 3 unit had at least one "individually controlled and reserved
 03:56:57 4 advertising data storage section adapted specifically for
 03:57:01 5 storing the specific data by undersizing data" that was
 03:57:05 6 "monitored and controlled by the remote transaction server."

03:57:09 7 In step one, the Federal Circuit found that the
 03:57:12 8 claim was simply directed to "using a computer to deliver
 03:57:16 9 targeted advertising to a user" which was an abstract idea.
 03:57:20 10 Now, the patentee had argued, otherwise, that the claim was
 03:57:23 11 instead directed to an improvement in the data delivery
 03:57:26 12 system's ability to store advertising by dedicating a
 03:57:29 13 section of the computer's memory to such data.

03:57:31 14 But the *Customedia* Court disagreed noting that
 03:57:35 15 "The claimed invention nearly improves the abstract concept
 03:57:38 16 of delivering targeted advertising using a computer only as
 03:57:41 17 a tool." It came to this conclusion because the claim did
 03:57:44 18 not "enable computers to operate more quickly or
 03:57:48 19 efficiently, nor do they solve any technological problem."

03:57:52 20 In support of that key conclusion, the Court
 03:57:54 21 noted that the "specification is silent as to any specific
 03:57:58 22 structural or inventive improvements in computer
 03:58:01 23 functionality related to this claim system." Instead, the
 03:58:05 24 Court said that the "only improvements identified in the
 03:58:07 25 specification are generic speed and efficiency improvements

03:59:29 1 then utilization of URIs that deeplink to a pre-filled text
 03:59:33 2 message that includes user data or website data, so long as
 03:59:36 3 the user clicks on an advertisement on the web page, all
 03:59:40 4 amounts to improvement in the way a computer technology
 03:59:43 5 worked in the space.

03:59:44 6 Column 1 indicates that prior to the invention,
 03:59:47 7 computerized mobile devices functioned in a different way to
 03:59:50 8 attempt to get customers to select the product service.
 03:59:53 9 That is, they agreed to direct the user to a vendor's
 03:59:57 10 application or a vendor's website in order to have them
 03:59:59 11 provide payment information through the use of many clicks.

04:00:02 12 Now, after the invention, according to Column 1,
 04:00:04 13 the device is functioning in a new and improved and
 04:00:07 14 different way, one that utilized the claimed
 04:00:11 15 custom-generated deeplinking process to allow users to sign
 04:00:13 16 up for promotions while minimizing user input.

04:00:16 17 Therefore, because Claim 1 is not directed to
 04:00:17 18 the abstract idea put forward by Defendants, the motions are
 04:00:22 19 denied at step one on that basis. Although the Court could
 04:00:25 20 stop there, for the sake of completion, it notes that even
 04:00:29 21 if it was somehow wrong about this step one conclusion, and
 04:00:32 22 even if Claim 1 could be said to have been directed to the
 04:00:36 23 abstract idea of streamlining the process for a customer to
 04:00:39 24 enroll in a marketing promotion by providing a pre-filled
 04:00:42 25 and pre-addressed request, the motions would still have been

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03:58:11 1 and hurt in applying the use of a computer to end tasks."
 03:58:16 2 In the Court's view, however, Claim 1 in the patents-in-suit
 03:58:19 3 here are not on all fours with the representative claim in
 03:58:22 4 the patents at issue in *Customedia*.

03:58:25 5 The Court has reviewed the representative '090
 03:58:28 6 patent that was at issue in *Customedia*. That patent's title
 03:58:31 7 was generic. It was "System For Data Management and On
 03:58:36 8 Demand Rental In The Purchase of Digital Data Products."
 03:58:38 9 Its abstract and other key portions of the patent did not
 03:58:42 10 seem to tout the unconventional nature of the claim's
 03:58:45 11 assertedly approved way to store advertising data. Indeed,
 03:58:48 12 it appears the patent specification said little about why
 03:58:51 13 the assertedly important claimed step of reserving memory to
 03:58:56 14 ensure sufficient storage space for advertising data was
 03:58:59 15 significant or why it amounted to an improvement in computer
 03:59:02 16 functionality.

03:59:03 17 In contrast here, as the Court has explained,
 03:59:05 18 the patent specification focuses resolutely and repeatedly
 03:59:08 19 on the importance of using what it calls custom-generated
 03:59:12 20 deeplinking to improve the way that mobile electronic
 03:59:14 21 devices are able to enroll customers in promotions. And in
 03:59:17 22 Column 1, the patents do appear to indicate that this
 03:59:20 23 particular claimed arrangement, that is, the use of
 03:59:24 24 integration tags embedded in web pages such that the tag
 03:59:26 25 returns user data to a server if a web page is accessed, and

04:00:45 1 denied in step two. That's because, for the reasons the
 04:00:48 2 Court has expressed, that abstract idea wouldn't fairly take
 04:00:52 3 into account other narrowing aspects of the claim, including
 04:00:55 4 at least, first, the claim's use of integration tags
 04:00:58 5 associated with a web page to collect user data when a user
 04:01:02 6 loads the web page via first application.

04:01:04 7 Second, the claim's click-to-text server
 04:01:07 8 creating and sending a URI to the mobile device in response
 04:01:10 9 to the device's execution of the integration tag.

04:01:12 10 And, third, the fact that the URI deep links to
 04:01:15 11 a messaging application such that when the user interacts
 04:01:18 12 with a promotional message on a website, the URI causes the
 04:01:22 13 mobile device to transition from the website app to the
 04:01:24 14 messaging app.

04:01:25 15 The Court understands Defendants' arguments,
 04:01:27 16 that each of these individual computer concepts, standing
 04:01:30 17 alone, were well known in the computer arts at the time.
 04:01:33 18 For example, the Court's already explained how the patent
 04:01:36 19 suggests that the use of URIs with deep links were known,
 04:01:39 20 nor that the patentees claim to have invented the
 04:01:41 21 integration tags.

04:01:42 22 The Plaintiff does not argue that the concept of
 04:01:44 23 pre-populated text messages in and of itself was not in use
 04:01:48 24 then and websites were surely well known at the time. But,
 04:01:50 25 of course, as the Federal Circuit told us in *BASCOM*, the

04:01:53 1 inventive concept inquiry requires more than recognizing
 04:01:56 2 that each claim element by itself was known in the art.
 04:01:59 3 Instead, it allows that an inventive concept can be found in
 04:02:02 4 a non-conventional and non-generic arrangement of known
 04:02:06 5 conventional pieces.

04:02:08 6 In the Court's view, the Defendants seem to
 04:02:09 7 ignore this instruction from *BASCOM*. Instead, they
 04:02:13 8 continually note that each additional claim element such as
 04:02:16 9 the use of servers, or use of web pages, or the use of an
 04:02:19 10 integration tag, or the use of URI from deep links to
 04:02:22 11 transition between applications were each, standing alone,
 04:02:26 12 well known at the time.

04:02:27 13 But *BASCOM*'s point is that even claims that use
 04:02:30 14 many individual technological components that themselves
 04:02:33 15 were conventional can still be patent eligible if the
 04:02:37 16 particular ordered combination of those known elements are
 04:02:40 17 used in an unconventional way.

04:02:42 18 In their briefing, Defendants also boldly
 04:02:45 19 asserted the particular ordered combination of technology
 04:02:48 20 set out in Claim 1. In fact, amounted to the "ordinary use"
 04:02:53 21 of computers at the time or the "ordinary and expected way"
 04:02:58 22 computers were being used then.

04:03:00 23 But Defendants certainly do not point to any
 04:03:02 24 part of the record that demonstrates that this was so as to
 04:03:05 25 the entirety of the ordered combination, and they do not

04:04:23 1 provides some suggestion of this in Column 1's background
 04:04:27 2 section when it discusses how a need exists in the art for
 04:04:30 3 the use of "methods and apparatus for dynamic application
 04:04:34 4 deeplink to transition from one user interface to another
 04:04:36 5 user interface and a mobile device." Because the typically
 04:04:40 6 used computerized process for computer promotion sign-up
 04:04:43 7 works in a different, less optimal way. And the Complaints
 04:04:46 8 also include some additional allegations about this topic of
 04:04:49 9 unconventional use of computer technology.

04:04:51 10 Now, the Court wishes that those allegations had
 04:04:56 11 been more robust and that they had included more factual
 04:04:58 12 data and supported the idea that the claim's use of the
 04:05:00 13 particular ordered combination of steps amounted to the
 04:05:03 14 unconventional combination of otherwise known computerized
 04:05:06 15 processes.

04:05:07 16 Even still, though, there's enough in the
 04:05:10 17 Complaints to at least indicate a plausible, factual dispute
 04:05:13 18 on that front. In part, the Court says so because the
 04:05:16 19 Complaint's allegations do state that the claim combination
 04:05:19 20 was not "well understood, routine or conventional" at the
 04:05:23 21 time. "Constituted technological improvements over
 04:05:27 22 traditional mobile sign-up and mobile messaging systems" and
 04:05:30 23 claim "an ordered combination of components interactions in
 04:05:33 24 an unconventional manner."

04:05:36 25 And they do, at least at times, go on to allege

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04:03:08 1 cite to any source for such a conclusion. Instead, they
 04:03:12 2 simply fall back on the notion that web pages alone were
 04:03:15 3 "ordinary", or that integration tags alone were ordered or
 04:03:19 4 the deep links alone were ordered. But that kind of
 04:03:23 5 argument is not enough because it doesn't address the
 04:03:25 6 ordered combination of all those known technological steps
 04:03:28 7 that are set out in the claim.

04:03:31 8 Indeed, during oral argument today when I asked
 04:03:33 9 at least Emotive's counsel as to whether certain
 04:03:35 10 combinations or portions of the claimed solution amounted to
 04:03:38 11 the unconventional use of computer technology at the time of
 04:03:40 12 the patent, counsel at times noted that there may be
 04:03:44 13 uncertainty on those points in the record stating that it
 04:03:47 14 may be "a little bit of a leap" to draw such conclusions
 04:03:50 15 from the record or that conventionality "has to be true."

04:03:55 16 Here, though, Defendants are asking the Court to
 04:03:58 17 grant a motion to dismiss based on the uncontested
 04:04:01 18 presence of a winning affirmative defense. And so, the
 04:04:04 19 record is unclear as to the key points. Or if the Court is
 04:04:07 20 asked to assume that something has to be true, then the
 04:04:10 21 motion should not be granted.

04:04:12 22 Moreover, there are some portions of the record
 04:04:14 23 that do suggest that the ordered combination of steps in
 04:04:17 24 Claim 1 did not amount to the conventional use of computer
 04:04:21 25 technology. For one thing, as I've noted, the patent

04:05:38 1 that the invention's use of the technology at issue
 04:05:41 2 revolutionized the relevant field, which can be an indicator
 04:05:44 3 that they did so because they used computers in a new and
 04:05:47 4 different way from what was done before.

04:05:50 5 Moreover, in at least the Postscript case,
 04:05:52 6 Plaintiff cited in Footnotes 4 to 6 of the Complaint to
 04:05:56 7 certain articles that can also support this notion of
 04:05:59 8 unconventionality. One such article, for example, stated
 04:06:02 9 that the patentee had explained that the problem with prior
 04:06:05 10 art computer solutions in this space was that "emails are
 04:06:08 11 slower, more crowded and a more cumbersome form of text
 04:06:12 12 messages. What's more, people today check and respond to
 04:06:14 13 texts at much higher volumes than emails."

04:06:17 14 The article notes that it is "not just the
 04:06:19 15 outdated email problem that Attentive's text-based marketing
 04:06:23 16 method solves. Another major loss point in the computer to
 04:06:26 17 brand sign-up journey is the need to install new application
 04:06:29 18 on one's phone. People don't really want to download an app
 04:06:33 19 anymore, notes Long, the patentee's founder. That's where
 04:06:37 20 Attentive's two-tap sign-up solution comes in."

04:06:40 21 A second article discussed how the claimed
 04:06:42 22 two-tap opt-in solution was a "key differentiator" from
 04:06:47 23 what other competing platforms were doing technologically in
 04:06:51 24 this space.

04:06:51 25 Lastly, as the Court's noted today, the concern

04:06:54 1 that drives the Section 101 inquiry is on preemption, what
 04:06:57 2 the claim, including its asserted inventive concepts would
 04:07:00 3 tie up or preempt too much of all possible systems or
 04:07:02 4 methods for putting the abstract idea into practice.

04:07:06 5 Here, as Plaintiff notes in its brief, while
 04:07:08 6 Defendants are correct that the abstract idea using
 04:07:10 7 pre-filled enrollment requests for prior use of the concept
 04:07:13 8 of receiving information about how to contact a customer, it
 04:07:16 9 is "not inherent that one must do so by having a
 04:07:20 10 click-to-text server transmit an integration tag to a client
 04:07:23 11 server which embeds the tag into a web page and serves the
 04:07:27 12 combination to a browser, which automatically executes the
 04:07:30 13 integration tag to return user data to "the server."

04:07:35 14 And while the Defendant's right that the
 04:07:36 15 abstract idea of using pre-filled enrollment requests
 04:07:39 16 necessarily requires that the actual creation of such a
 04:07:44 17 "request," it is not inherent that one must accomplish that
 04:07:47 18 goal by having a click detect server send a custom URI with
 04:07:51 19 a deeplink to the browser for the browser to associate URI
 04:07:54 20 with the advertisement on the web page, that the URI to
 04:07:57 21 deeplink to a messaging application and for the deeplink to
 04:08:00 22 cause the application to create a pre-filled request for the
 04:08:02 23 custom text message."

04:08:04 24 In making these statements, in the Court's view,
 04:08:07 25 Plaintiff, at least in part, is making a preemption argument

04:08:09 1 that the particular claim combination is simply one
 04:08:12 2 particular way, among many, for "streamlining the process
 04:08:15 3 for a customer to enroll in a marketing promotion by
 04:08:19 4 providing a pre-filled and pre-addressed request," that it
 04:08:23 5 may not, and it would preempt the relevant field. And the
 04:08:25 6 extent to which an order would not do so would amount to a
 04:08:29 7 factual dispute that would mitigate enhanced requirements of
 04:08:32 8 the motions in step two if the Court had equaled them
 04:08:36 9 together.

04:08:36 10 So, for all those reasons, the Court will deny
 04:08:39 11 Defendants' motions on Section 101 grounds at step one. And
 04:08:44 12 it simply notes for the record that even if its call as to
 04:08:46 13 step one had been wrong, the Court would have still
 04:08:50 14 otherwise on this record denied the motion in step two.

04:08:53 15 The Court also notes that it will endeavor to
 04:08:55 16 resolve the remainder of Emotive's motion with regard to
 04:08:59 17 plausibility issues as soon as it can. Likely, by the way,
 04:09:01 18 in short order that the Court will issue something on that.

04:09:04 19 All right. With all that said, and many, many
 04:09:08 20 minutes, hours, the Court has resolved at least three
 04:09:11 21 motions that were pending today. As I said before, the
 04:09:15 22 Court's analysis here today, I will intend to take it and
 04:09:19 23 later put it into a written opinion which will simply
 04:09:23 24 include the transcript of what I said, will clean up any
 04:09:26 25 typos and will add citations that the Court does, indeed,

04:09:30 1 have in its notes before it, but simply didn't include today
 04:09:33 2 for sake of time.
 04:09:35 3 All right. So, with all that said, I want to
 04:09:38 4 say, again, thanks to counsel for their arguments today. I
 04:09:43 5 was thinking to myself that I was going to go home tonight
 04:09:45 6 and say to my family, You know, it was really interesting
 04:09:48 7 today working, this discussion in Court. I know when my
 04:09:51 8 kids ask me, What was the discussion about and I tell them
 04:09:53 9 it was about issues regarding patent eligibility, they're
 04:09:57 10 going to be disappointed in that. They'll say, Dad, that
 04:10:02 11 sounds boring.

04:10:02 12 But I don't think it's boring. I think it's
 04:10:04 13 really interesting, and I'm really grateful to counsel for
 04:10:06 14 their thoughts and advice, not only on how to resolve these
 04:10:09 15 motions, but more generally on the concession of 101 in this
 04:10:12 16 context.

04:10:13 17 So, with all that said, unless there's anything
 04:10:15 18 further, I know we're late in the day on a Friday, we will
 04:10:18 19 end our court hearing here today. I wish all of our
 04:10:22 20 out-of-town folks safe travel as they travel home. I look
 04:10:24 21 forward to talking to you and seeing all of you further in
 04:10:27 22 these cases in the future.

04:10:28 23 And with all that said, the Court will stand in
 04:10:31 24 recess. Thank you.

04:10:32 25 DEPUTY CLERK: All rise.

1 (Court was recessed at 4:10 p.m.)
 2 I hereby certify the foregoing is a true and
 3 accurate transcript from my stenographic notes in the
 4 proceeding.

5 /s/ Heather M. Triozzi
 6 Certified Merit and Real-Time Reporter
 7 U.S. District Court

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